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## Utility "Services" Under the Uniform Commercial Code: Are Public Utilities in For a Shock?

Jane P. Mallor\*

Article Two of the Uniform Commercial Code ("the Code") applies to all "transactions in goods."<sup>1</sup> Because the Code differs in significant respects from the common law, classifying a contract as a transaction in goods has great practical significance, and may even dictate the outcome of a case. In most commercial transactions there is little doubt whether the contract is for the sale of goods or for the performance of a service. Where the transaction is only analogous to a sale of goods<sup>2</sup> or involves a blend of goods and services,<sup>3</sup> however, the issue of what body of law applies provides a fertile field for litigation and commentary.<sup>4</sup>

The characterization of utility supply contracts is one such problematic area. In the past, courts assumed that a utility company's transfer of gas, electricity or water to consumers was a service,<sup>5</sup> to which common law principles applied. Although such transactions are usually referred to as utility "services," they are not true services in the sense that the performance of an act is being bargained for. The act contemplated is merely the delivery of the utility product<sup>6</sup> to the customer.<sup>7</sup>

In recent years a growing number of courts have either characterized utili-

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1 U.C.C. § 2-102.

2 See, e.g., *Johnson v. Sears, Roebuck & Co.*, 355 F. Supp. 1065 (E.D. Wis. 1973); *St. Johnsbury & Lamoille County R.R. v. Canadian Pacific Ry. Co.*, 341 F. Supp. 1368 (D. Vt. 1972), *aff'd per curiam*, 469 F.2d 1395 (2d Cir. 1972); *Pollard v. Saxe & Yolles Dev. Co.*, 12 Cal. 3d 374, 525 P.2d 88, 115 Cal. Rptr. 648 (1974); *Pena v. Sita World Travel, Inc.*, 88 Cal. App. 3d 642, 152 Cal. Rptr. 17 (1978); *Martin v. Ryder Truck Rental, Inc.*, 353 A.2d 581 (Del. 1976); *Immergluck v. Ridgeview House, Inc.*, 53 Ill. App. 3d 472, 368 N.E.2d 803 (1977); *Lewis v. Big Powderhorn Mountain Ski Corp.*, 69 Mich. App. 437, 245 N.W.2d 81 (1976); *McCool v. Hoover Equip. Co.*, 415 P.2d 954 (Okla. 1966).

3 See, e.g., *Chutich v. Samuelson*, 33 Colo. App. 195, 518 P.2d 1363 (1973); *rev'd in part sub nom.*, *Samuelson v. Chutich*, 187 Colo. 155, 529 P.2d 631 (1974); *Paint Prods. Co. v. AA-1 Steel Equip. Co.*, 35 Conn. Supp. 52, 393 A.2d 1317 (Super. Ct. 1977); *Care Display, Inc. v. Didde-Glaser, Inc.*, 225 Kan. 232, 589 P.2d 599 (1979); *Burton v. Artery Co.*, 279 Md. 94, 367 A.2d 935 (1977); *Cork Plumbing Co. v. Martin Bloom Assocs., Inc.*, 573 S.W.2d 947 (Mo. Ct. App. 1978); *Air Heaters, Inc. v. Johnson Elec., Inc.*, 258 N.W.2d 649 (N.D. 1977); *Newmark v. Gimbel's Inc.*, 54 N.J. 585, 258 A.2d 697 (1969); *Hoover v. Montgomery Ward & Co.*, 270 Or. 498, 528 P.2d 76 (1974).

4 Farnsworth, *Implied Warranties in Non-Sales Cases*, 57 COLUM. L. REV. 653 (1957); Greenfield, *Consumer Protection in Service Transactions—Implied Warranties and Strict Liability in Tort*, 74 UTAH L. REV. 661 (1974); Murray, *Under the Spreading Analogy of Article 2 of the Uniform Commercial Code*, 39 FORDHAM L. REV. 447 (1971); Reynolds, *Strict Liability for Commercial Services—Will Another Citadel Crumble?*, 30 OKLA. L. REV. 298 (1977); Singal, *Extending Implied Warranties Beyond Goods: Equal Protection for Consumers of Services*, 12 NEW ENG. L. REV. 859 (1977); Note, *The Application of Implied Warranties to Predominantly "Service" Transactions*, 31 OHIO ST. L.J. 580 (1970); Comment, *Sales-Service Hybrid Transactions: A Policy Approach*, 28 SW. L.J. 575 (1974).

5 See, e.g., *Buckeye Union Fire Ins. Co. v. Detroit Edison Co.*, 38 Mich. App. 325, 196 N.W.2d 316 (1972) (assuming electricity a "service," but applying warranty law by analogy); *Wood v. Public Serv. Co. of N. H.*, 114 N.H. 182, 317 A.2d 576 (1974); *Coast Laundry v. Lincoln City*, 9 Or. App. 521, 497 P.2d 1224 (1972). *But see* *Canavan v. City of Mechanicville*, 229 N.Y. 473, 478, 128 N.E. 882, 883 (1920).

6 Gas, electricity and water are referred to as "utility products" throughout this article.

7 See Reynolds, *supra* note 4, at 308.

ty supply contracts as sales of goods<sup>8</sup> or have considered such contracts to be sufficiently analogous to sales of goods to justify the application of Uniform Commercial Code principles.<sup>9</sup> All but two of these cases have involved product liability issues.<sup>10</sup> No court has yet considered other implications of Code applicability, such as the impact of the Code's provisions regarding burden of proof,<sup>11</sup> unconscionability,<sup>12</sup> statute of limitations,<sup>13</sup> and the duty to give advance notice of planned interruptions.<sup>14</sup>

A change in the legal responsibilities of suppliers of necessary and costly products merits more complete examination. In an era of energy shortage and increased litigation between utility suppliers and consumers, it is vital to decide what body of law applies to these disputes. In making this determination, courts must recognize the overall effect of applying a new body of law to utilities litigation. Only then will they be able to determine whether policy justifications outweigh the costs of such drastic change.

This article explores the legal ramifications of applying the Uniform Commercial Code to utility supply contracts. Although other aspects of the problem are discussed, the article focuses on the two situations that most frequently give rise to consumer lawsuits against utility suppliers: injury caused by an unsafe supply of a utility product and injury caused by interruption or termination of the supply.

## I. Utility Products: Goods or Services?

### A. Nonutility Cases

Although the debate over the sales-service distinction predates the Code,<sup>15</sup>

8 See, e.g., *Helvey v. Wabash County REMC*, 151 Ind. App. 176, 278 N.E.2d 608 (1972); *Gardiner v. Philadelphia Gas Works*, 413 Pa. 415, 197 A.2d 612 (1964); *Moody v. City of Galveston*, 524 S.W.2d 583 (Tex. Civ. App. 1975); *Kasey v. Suburban Gas Heat of Kennewick, Inc.*, 374 P.2d 549 (Wash. 1962) (sale of propane gas); *Murphy v. Petrolane-Wyoming Gas Serv.*, 468 P.2d 969 (Wyo. 1970). In addition, several courts have held utility products to be "products" within the meaning of § 402A of the RESTATEMENT (SECOND) OF TORTS. See *Troszynski v. Commonwealth Edison Co.*, 42 Ill. App. 3d 925, 356 N.W.2d 926 (1976); *Petroski v. Northern Ind. Pub. Serv. Co.*, 354 N.W.2d 736 (Ind. App. 1976); *Ransome v. Wisconsin Elec. Power Co.*, 87 Wis. 2d 605, 275 N.W.2d 641 (1979). See generally Note, *Torts of Electric Utilities: Can Strict Liability Be Plugged In?*, 11 Loy. L.A. L. Rev. 775 (1978). Since the term "product" is virtually synonymous with "goods," these authorities will be used in this article. See also notes 55-62 *infra* and accompanying text.

9 See, e.g., *Kulhanjian v. Detroit Edison Co.*, 73 Mich. App. 347, 251 N.W.2d 580 (1977); *Buckeye Union Fire Ins. Co. v. Detroit Edison Co.*, 38 Mich. App. 325, 196 N.W.2d 316 (1972); *University of Pittsburgh v. Equitable Gas Co.*, 5 Pa. D. & C.3d 303 (C.P. Allegheny County 1978); *Wivagg v. Duquesne Light Co.*, 73 Pa. D. & C.2d 694 (C.P. Allegheny County 1975). See also notes 63-70 *infra* and accompanying text.

10 *Helvey v. Wabash County REMC*, 151 Ind. App. 176, 278 N.E.2d 608 (1972) (statute of limitations); *Gardiner v. Philadelphia Gas Works*, 413 Pa. 415, 197 A.2d 612 (1964) (statute of limitations).

11 See notes 207-30 *infra* and accompanying text.

12 See note 221 *infra*.

13 U.C.C. § 2-725(1) provides:

An action for breach of any contract for sale must be commenced within four years after the cause of action has accrued. By the original agreement the parties may reduce the period of limitation to not less than one year but may not extend it.

The application of U.C.C. § 2-725 to suits against utility companies for breach of sales contracts would generally lengthen the period of limitations, since such suits would otherwise be brought as tort actions subject to a shorter period of limitations. See, e.g., *Helvey v. Wabash County REMC*, 151 Ind. App. 176, 278 N.E.2d 608 (1972); *Gardiner v. Philadelphia Gas Works*, 413 Pa. 415, 197 A.2d 612 (1964).

14 See note 228 *infra*.

15 See, e.g., *Mayor of Jersey City v. Town of Harrison*, 71 N.J.L. 69, 58 A. 100 (Sup. Ct. 1904), *aff'd*, 72 N.J.L. 185, 62 A. 765 (N.J. 1905); *Canavan v. City of Mechanicville*, 229 N.Y. 473, 128 N.E. 882 (1920); See Comment, *Dual Nature Contracts and the Uniform Commercial Code*, 28 MD. L. REV. 136, 137 (1968).

the Code's provisions for implied warranties of quality<sup>16</sup> have added to the controversy. Because implied warranties have generally been limited to sales of goods,<sup>17</sup> many enterprising plaintiff's lawyers have sought to convince the court that a transaction resulting in harm to their client was a sale of goods and not a service.

Courts have not insisted on the existence of a technical sale of goods for the application of Code principles if a tangible product unconnected with the rendition of a service has been supplied. For example, Code warranties (and strict tort liability as well) have been imposed in both non-sale transactions, such as bailments<sup>18</sup> and chattel leases,<sup>19</sup> and in non-goods transactions, such as the sale of a new home.<sup>20</sup> On the other hand, courts have almost uniformly held Code concepts and strict liability doctrines inapplicable to cases involving the rendition of "pure" services,<sup>21</sup> particularly professional services.<sup>22</sup> The most spirited battle over the Code's applicability has involved contracts providing for both the sale of goods and the performance of a service ("hybrid contracts"). The cases reveal three basic approaches to these contracts.<sup>23</sup>

The majority of the hybrid contract cases follow the approach of *Perlmutter*

16 U.C.C. §§ 2-314 and 2-315 govern the implied warranties of merchantability and fitness for a particular purpose, respectively. U.C.C. § 2-314(1) provides that "a warranty that the goods shall be merchantable is implied in a contract for their sale if the seller is a merchant with respect to goods of that kind." One of the synonymous phrases given for "merchantability" in U.C.C. § 2-314 is that the goods are fit for the ordinary purposes for which such goods are used. U.C.C. § 2-315, on the other hand, provides that a warranty is implied that the goods will be fit for the buyer's particular purpose "where the seller at the time of contracting has reason to know any particular purpose for which the goods are required and that the buyer is relying on the seller's skill or judgment to select or furnish suitable goods." See notes 74-86 *infra* and accompanying text.

17 See Farnsworth, *Implied Warranties of Quality in Non-Sales Cases*, 57 COLUM. L. REV. 653 (1957); Reynolds, *supra* note 4, at 299.

18 See, e.g., *McClaffin v. Bayshore Equip. Co.*, 274 Cal. App. 2d 446, 79 Cal. Rptr. 337 (1969); *Fulbright v. Klamath Gas Co.*, 271 Or. 449, 533 P.2d 316 (1975). See generally Note, *Products Liability: Extension of Strict Liability to Bailors*, 28 OKLA. L. REV. 913 (1975); Comment, *Strict Liability of the Bailor, Lessor and Licensor*, 57 MARQ. L. REV. 111 (1973).

19 See, e.g., *Martin v. Ryder Truck Rental, Inc.*, 353 A.2d 581 (Del. 1976); *W.E. Johnson Equip. Co. v. United Airlines, Inc.*, 238 So. 2d 98 (Fla. 1970); *All-States Leasing Co. v. Bass*, 96 Idaho 873, 538 P.2d 1177 (1975); *Cintrone v. Hertz Truck Leasing & Rental Serv.*, 45 N.J. 434, 212 A.2d 769 (1965); *Owens v. Patent Scaffolding Co.*, 77 Misc. 2d 992, 354 N.Y.S.2d 778 (Sup. Ct. 1974).

20 See, e.g., *Wawak v. Stewart*, 247 Ark. 1093, 449 S.W.2d 922 (1970); *Pollard v. Saxe & Yolles Dev. Co.*, 12 Cal. 3d 374, 525 P.2d 88, 115 Cal. Rptr. 648 (1974); *Theis v. Heuer*, 264 Ind. 1, 280 N.E.2d 300 (1972); *Schipper v. Levitt & Sons, Inc.*, 44 N.J. 70, 207 A.2d 314 (1965); *Rothberg v. Olenik*, 128 Vt. 295, 262 A.2d 461 (1970). See generally Roberts, *The Case of the Unwary Home Buyer: The Housing Merchant Did It*, 52 CORNELL L.Q. 835 (1967); Note, *Real Property: Liability of Builder-Vendor for Defects in a New House*, 26 OKLA. L. REV. 111 (1973); Comment, *Extension of Implied Warranties to Developer-Vendors of Completed New Homes*, 11 URB. L. ANN. 257 (1976).

21 See, e.g., *Gagne v. Bertran*, 43 Cal. 2d 481, 275 P.2d 15 (1954); *Pena v. Sita World Travel, Inc.*, 88 Cal. App. 3d 642, 152 Cal. Rptr. 17 (1979); *Strong v. Retail Credit Co.*, 38 Colo. App. 125, 522 P.2d 1025 (1976); *Immergluck v. Ridgeview House, Inc.*, 53 Ill. App. 3d 472, 368 N.E.2d 803 (1977); *Lewis v. Big Powderhorn Mountain Ski Corp.*, 69 Mich. App. 437, 245 N.W.2d 81 (1976); *Aegis Prod., Inc. v. Arriflex Corp.*, 25 A.D.2d 639, 268 N.Y.S.2d 185 (1966); *But see McCool v. Hoover Equip. Co.*, 415 P.2d 954 (Okla. 1966).

22 See, e.g., *La Rossa v. Scientific Design Co.*, 402 F.2d 937 (3d Cir. 1968); *Carroll v. Grabavoy*, 27 U.C.C. Rptr. 940 (Ill. App. 1979); *Magrine v. Krasnica*, 94 N.J. Super. 228, 227 A.2d 539 (Hudson County Ct. 1967), *aff'd sub nom. Magrine v. Spector*, 100 N.J. Super. 223, 241 A.2d 637 (App. Div. 1968), *aff'd*, 53 N.J. 259, 250 A.2d 129 (1969) (per curiam); *Barbee v. Rogers*, 425 S.W.2d 342 (Tex. 1968); *Hoven Co. v. Kelble*, 79 Wis. 2d 444, 256 N.W.2d 379 (1977). *But see Johnson v. Sears, Roebuck & Co.*, 355 F. Supp. 1065 (E.D. Wis. 1973); *Broyles v. Brown Eng'r Co.*, 275 Ala. 25, 151 So. 2d 767 (1963); Mallor, *Liability Without Fault for Professional Services: Toward a New Standard of Professional Accountability*, 9 SETON HALL L. REV. 474 (1978) (arguing for the extension of liability without fault to standardized professional services); Singal, *supra* note 4, at 910-26 (arguing for warranty protection for consumers of those professional services that are capable of a high degree of certainty).

23 See J. WHITE & R. SUMMERS, *HANDBOOK OF THE LAW UNDER THE UNIFORM COMMERCIAL CODE* § 9-6, at 286-89 (1972) [hereinafter cited as WHITE & SUMMERS].

*v. Beth David Hospital*.<sup>24</sup> In *Perlmutter*, the plaintiff contracted serum hepatitis from contaminated blood supplied him by a hospital in connection with medical treatment. Plaintiff sued the hospital for breach of implied warranty, arguing that the Code's warranty provisions were applicable since the defendant had supplied goods to him. The court denied plaintiff's claim,<sup>25</sup> using what has come to be known as the "essence test." Under this test, common law principles rather than Code principles apply when the parties have bargained primarily for services rather than for goods.<sup>26</sup> This approach has been widely followed in blood cases<sup>27</sup> as well as in other hybrid cases.<sup>28</sup> It is difficult to predict which element will be considered predominant,<sup>29</sup> although courts are less likely to apply the Code when injury is caused by the service element alone.<sup>30</sup>

A second approach in hybrid cases treats the contract as divisible, applying the Code only to that part which concerns the sale of goods. This approach was used in *Foster v. Colorado Radio Corp.*,<sup>31</sup> in which the defendant contracted to buy all the assets of a radio station, including its license, real estate, good will, studios, and furnishings. Upon defendant's breach, plaintiff resold the assets at a lower price and sued defendant for the difference. The defendant argued that she was not liable for damages because plaintiff had failed to give notice of its intention to resell as required by the Code. Although the trial court found the Code inapplicable because the primary subject matter of the contract was not goods,<sup>32</sup> the Tenth Circuit saw "no reason not to view the Foster contract in two parts as affecting the sale of goods and non-goods."<sup>33</sup> It then applied the Code to the sale of furnishings portion of the contract, and affirmed the trial

24 308 N.Y. 100, 123 N.E.2d 792 (1954).

25 *Id.* at 106, 123 N.E.2d 796.

26 For a history of the essence test as developed in English law, see Note, *Products and the Professional: Strict Liability in the Sales-Service Hybrid Transaction*, 24 HASTINGS L.J. 111, 113-14 (1972).

27 See, e.g., *Sawyer v. Methodist Hosp.*, 522 F.2d 1102 (6th Cir. 1975); *McDaniel v. Baptist Memorial Hosp.*, 469 F.2d 230 (6th Cir. 1973); *McDonald v. Sacramento Medical Foundation Blood Bank, Inc.*, 62 Cal. App. 3d 866, 133 Cal. Rptr. 444 (1976); *Shepard v. Alexian Bros. Hosp., Inc.*, 109 Cal. Rptr. 132 (Cal. App. 1973); *Schuchman v. Johns Hopkins Hosp.*, 9 U.C.C. Rptr. 637 (Md. Super. Ct. 1971); *Friend v. Columbus Hosp.*, 18 U.C.C. Rptr. 78 (N.Y. Sup. Ct. 1975); *Foster v. Memorial Hosp. Ass'n of Charleston*, 219 S.E.2d 916 (W. Va. 1975). *But see* *Cunningham v. MacNeal Memorial Hosp.*, 47 Ill. 2d 443, 266 N.E. 2d 897 (1970); *Hoffman v. Misericordia Hosp.*, 439 Pa. 501, 267 A.2d 867 (1970). *See generally Hospital's Liability for Transfusing Serum Hepatitis Contaminated Blood*, 44 TEMP. L.Q. 575 (1971).

28 See, e.g., *Bonebrake v. Cox*, 499 F.2d 951 (8th Cir. 1974) (delivery and installation of bowling equipment); *Berry v. G.D. Searle & Co.*, 56 Ill. 2d 548, 309 N.E.2d 550 (1974) (oral contraceptives distributed in connection with birth control advice); *Care Display, Inc. v. Didd-Glaser, Inc.*, 225 Kan. 232, 589 P.2d 599 (1979) (construction of trade show display booth); *Burton v. Artery Co., Inc.*, 279 Md. 94, 367 A.2d 935 (1977) (sale and installation of trees, shrubs, and sod); *Cork Plumbing Co., Inc. v. Martin Bloom Assocs., Inc.*, 573 S.W.2d 947 (Mo. App. 1978) (plumbing construction contract); *National Historic Shrines Foundation v. Dali*, 4 U.C.C. Rptr. 71 (N.Y. Sup. Ct. 1967) (painting and donation of a picture).

29 *Compare, e.g., North Am. Leisure Corp. v. A & B Duplicators, Ltd.*, 468 F.2d 695 (2d Cir. 1972) (contract in which creditor used own materials in reproducing debtor's master tape and packaging reproductions into saleable units was primarily a contract for services) with *Lake Wales Publishing Co., Inc. v. Florida Visitor, Inc.*, 335 So. 2d 335 (Fla. App. 1976) (contract to compile, edit and publish pamphlets and other printed material was a sale of goods).

30 See, e.g., *Dixie Lime & Stone Co. v. Wiggins Scale Co.*, 144 Ga. App. 145, 240 S.E.2d 323 (1977); *Hoover v. Montgomery Ward & Co.*, 528 P.2d 76 (Or. 1974). *But see* *Paint Prods. Co. v. AA-1 Steel Equip. Co.*, 35 Conn. Supp. 52, 393 A.2d 1317 (Super. Ct. 1977).

31 381 F.2d 222 (10th Cir. 1967). For an excellent discussion of this case and other approaches to hybrid contracts, see generally Comment, *supra* note 15.

32 *Foster v. Colorado Radio Corp.*, 381 F.2d at 225.

33 *Id.* at 226.

court's ruling as to the remainder.<sup>34</sup> While the *Foster* approach may be useful for resolving a measure-of-damages problem involving an easily divisible contract, it would result in hairsplitting over contracts in which the goods and services elements are not realistically separable, and would create impractical results in cases involving the statute of frauds or the statute of limitations.<sup>35</sup>

The third approach to hybrid contracts disdains the mechanical distinction between goods and services, and applies the Code where its policies are served.<sup>36</sup> Under this "analogical approach," Code principles are given broad application to problems analogous to those contemplated by the drafters of the Code.<sup>37</sup> Proponents of the analogical approach characterize the Code as embodying the most advance thinking in commercial law:<sup>38</sup>

[T]he *Uniform Commercial Code*—because of the unique sophistication and thoroughness of the drafting process, the representation of all interested parties, and the existence of a vast number of similar situations not expressly within its coverage—is an example par excellence of a statute that is appropriate for use as a premise for reasoning.<sup>39</sup>

Because it considers underlying policies and commercial realities, the analogical approach has won many adherents among courts<sup>40</sup> and commentators.<sup>41</sup> The analogical approach was employed in *Paint Products Company v. AA-1 Steel Equipment Co.*<sup>42</sup> In that case, defendant had installed new and used shelving in plaintiff's retail paint store. The shelving separated from the wall and threw plaintiff's inventory onto the floor. Although plaintiff had only alleged a defect in the *installation* of the shelving, the court applied the Code warranties, stating:

[T]his court is inclined to adopt the more liberal trend which appears to be based upon reason and logic. There is no sound reason why a manufacturer

34 *Id.* at 227; *Miller v. Belk*, 23 N.C. App. 1, 207 S.E.2d 792 (1974); *Melms v. Mitchell*, 266 Or. 208, 512 P.2d 1336 (1973) (*en banc*). *But see* *Dynamic Corp. of Am. v. International Harvester Co.*, 429 F. Supp. 341, 347 n.13 (S.D.N.Y. 1977) (rejecting *Foster* approach); *Field v. Golden Triangle Broadcasting, Inc.*, 451 Pa. 410, 423, 305 A.2d 689, 696 (1973) (rejecting *Foster* approach).

35 See, for example, the conundrum facing the court in *Dehahn v. Innes*, 356 A.2d 711 (Me. 1976) (applying U.C.C. § 2-201(3) "admission in court" exception to the statute of frauds to entire contract for the sale of a business including a small amount of real estate). See Comment, *supra* note 15, at 143.

36 See 1 A. SQUILLANTE & J. FONSECA, WILLISTON ON SALES § 5-6, at 104-05 (4th ed. 1973).

37 Note, *The Uniform Commercial Code as a Premise for Judicial Reasoning*, 65 COLUM. L. REV. 880, 888 (1965); Comment, *supra* note 15, at 140.

38 See Comment, *supra* note 15, at 140.

39 Note, *supra* note 37, at 887.

40 See, e.g., *Vitex Mfg. Corp. v. Caribtex Corp.*, 377 F.2d 795 (3d Cir. 1967) (applying U.C.C. § 2-708 by analogy to service contract); *Transatlantic Fin. Corp. v. United States*, 363 F.2d 312 (D.C. Cir. 1966) (applying U.C.C. §§ 2-614(a), -615(a) by analogy to contract of carriage); *Lewis v. Anchorage Asphalt Paving Co.*, 535 P.2d 1188 (Alaska 1975) (implying warranty in paving contract); *Paint Prods. Co. v. AA-1 Steel Equip. Co.*, 35 Conn. Supp. 52, 393 A.2d 1317 (Super. Ct. 1977) (implying warranty for installation of shelving); *Zamore v. Whitten*, 395 A.2d 435 (Me. 1978) (applying U.C.C. §§ 2-204, -206 by analogy to contract for sale of stock in closed corporation); *Insurance Co. of N. Am. v. Radiant Elec. Co.*, 55 Mich. App. 410, 222 N.W.2d 323 (1974) (implying warranties on installation of goods by electrical contractor), *leave to appeal denied*, 393 Mich. 763 (1974); *Air Heaters, Inc. v. Johnson Elec., Inc.*, 258 N.W.2d 649 (N.D. 1977) (implying warranties for installation of goods by electrical contractor); *McCool v. Hoover Equip. Co.*, 415 P.2d 954 (Okla. 1966) (implying warranty in contract to chrome used crankshafts).

41 See, e.g., 1 A. SQUILLANTE & J. FONSECA, WILLISTON ON SALES § 5-6 at 104-05 (4th ed. 1973); *Farnsworth*, *supra* note 4; *Singal*, *supra* note 4; Note, *supra* note 37; Comment, *Sales-Service Hybrid Transactions: A Policy Approach*, 28 Sw. L.J. 575 (1974).

42 35 Conn. Supp. 52, 393 A.2d 1317 (Super. Ct. 1977).

who either incidentally or as an integral part of his operations renders services in the installation of his goods, who knows the use and purpose for which they are intended, and who knows that the user thereof is relying on his skill and judgment, should not be held liable under the theory of breach of warranty for each and every step of the process under his control, including services rendered by him, by which the goods are transferred to the ultimate user.<sup>43</sup>

The Code itself provides support for the analogical approach.<sup>44</sup> Section 1-102 provides that the Code is to be liberally construed to promote its underlying purposes and policies.<sup>45</sup> The official comment to that section permits courts to freely apply Code provisions to new and unforeseen circumstances, so long as the application of a provision is limited to its rationale.<sup>46</sup> In addition, the scope section of the sales article itself states that “[u]nless the context otherwise requires, this Article applies to transactions in goods . . . .” (emphasis added).<sup>47</sup> This language can be interpreted to mean that Article Two applies only to transactions in goods unless the context requires its application to contracts otherwise outside its scope. It has also been suggested that “transactions in goods” is a more inclusive phrase than “sale of goods,” so that by its terms the Code governs all contracts involving goods.<sup>48</sup> Finally, official comments to several substantive sections of the Code specify that the drafters did not intend to prevent application of the Code by analogy.<sup>49</sup>

### B. Utility Cases

A number of cases reported since 1964 have considered whether the Code's principles apply to the sale of gas, electricity or water. Although it has been argued that such sales involve hybrid contracts for both a service (the distribution) and a consumable product (the actual gas, electricity or water),<sup>50</sup> it has also been argued that “the essence—perhaps the entirety—of the ‘ser-

43 *Id.* at 52, 393 A.2d at 1318.

44 *See Singal, supra* note 4, at 886-91.

45 U.C.C. § 1-102.

46 U.C.C. § 1-102, Official Comment 1.

47 U.C.C. § 2-102.

48 *See Singal, supra* note 4, at 888.

49 U.C.C. § 2-105(1), Official Comment 1:

“Investment securities” are expressly excluded from the coverage of this Article. It is not intended by this exclusion, however, to prevent the application of a particular section of this Article by analogy to securities . . . when the reason of that section makes such application sensible and the situation involved is not covered by the Article of this Act dealing specifically with such securities.

Several courts have applied the Code by analogy to cases involving investment securities. *Stern & Co. v. State Loan and Fin. Corp.*, 238 F. Supp. 901 (D. Del. 1965); *Zamore v. Whitten*, 395 A.2d 435 (Me. 1978). *See also* U.C.C. § 2-313, Official Comment 2:

Although this section is limited in its scope and direct purpose to warranties made by the seller to the buyer as part of a contract for sale, the warranty sections of this Article are not designed in any way to disturb those lines of case law growth which have recognized that warranties need not be confined either to sales contracts or to the direct parties to such a contract. They may arise in other appropriate circumstances such as in the case of bailments for hire, whether such bailment is itself the main contract or is merely a supplying of containers under a contract for the sale of their contents. The provisions of Section 2-318 on third party beneficiaries expressly recognize this case law development within one particular area. Beyond that, the matter is left to the case law with the intention that the policies of this Act may offer useful guidance in dealing with further cases as they arise.

50 *See Wivagg v. Duquesne Light Co.*, 73 Pa. D. & C.2d 694 (C.P. Allegheny County Ct. 1975); *Ransome v. Wisconsin Elec. Power Co.*, 275 N.W.2d 641, 643 (Wis. 1979).

vice' performed consists of a transfer of a product."<sup>51</sup> Perhaps because courts have realized that utility products cannot realistically be separated from their distribution, no court has attempted to utilize either the essence test or the *Foster* approach to resolve the question of Code applicability to utility cases. Instead, three other approaches have been used.

The first approach involves a cursory characterization of the transfer of utility products as either a sale or a service. In *Coast Laundry v. Lincoln City*,<sup>52</sup> for example, a municipal water company supplied a laundry with water containing particles of tar. The tar stained clothes and left a residue on plaintiff's machinery. Plaintiff sued the water company for breach of implied warranties of merchantability and of fitness for a particular purpose. The court held the Code inapplicable,<sup>53</sup> impliedly finding that the sale of water was not a sale of goods.<sup>54</sup> In *Gardiner v. Philadelphia Gas Works*,<sup>55</sup> another court reached a different conclusion with even less discussion. Holding the Code's statute of limitations applicable to the provision of gas service,<sup>56</sup> the court stated in a footnote: "It is undisputed that the supplying of gas to Gardiners' home on a month-to-month basis falls within the definition of a 'contract for sale' or 'sale' within Section 2-106 of the Code."<sup>57</sup>

A second approach applies the U.C.C. on a literal basis. Section 2-105 of the Code defines "goods" to include "all things . . . which are movable at the time of identification to the contract for sale . . ."<sup>58</sup> In utility supply contracts identification occurs, at the very latest, when the utility product is drawn through the customer's meter.<sup>59</sup> Proponents of the literal approach argue that,

51 Reynolds, *supra* note 4, at 308.

52 9 Or. App. 521, 497 P.2d 1224 (1972).

53 *Id.* at 529, 497 P.2d at 1228. The court relied on *Canavan v. City of Mechanicville*, 229 N.Y. 473, 128 N.E. 882, as authority for the proposition that no implied warranties of quality attached to the sale of water. *Canavan* was brought under the Uniform Sales Act by a water customer who had contracted typhoid fever from drinking contaminated water supplied by a municipal water company. The court stated that for a warranty of quality to have been made under UNIFORM SALES ACT § 15, it was necessary for the buyer to have made his particular purpose known to the seller and to have relied on the seller's skill and judgment. While the court held that the sale of water *was* a sale of goods, it decided that no implied warranty existed because the buyer had not made his purpose known to the seller. *Id.* at 478, 128 N.E. at 883. *But see* the prescient dissent by Justice Pound, *id.* at 481-82, 128 N.E. at 884. Because implied warranties are more easily created under the U.C.C. than under the UNIFORM SALES ACT, the *Canavan* holding was easily distinguishable.

54 The only hint of an express decision that water is not a good was the court's bare citation of U.C.C. § 2-105 (1968 version), Official Comment 1, which states in part that the definition of goods is "not intended to deal with things which are not fairly identifiable as movables before the contract is performed." *But see* *Moody v. City of Galveston*, 524 S.W.2d 583 (Tex. Civ. App. 1975) (applying strict tort liability to municipal water company's sale of water which was mixed with flammable gas, impliedly deciding that water was a "good," and—interestingly enough—citing *Coast Laundry, Inc. v. Lincoln City* as authority for the proposition that water supply by a municipal corporation constitutes a sale of goods). *See also* *Canavan v. City of Mechanicville*, 229 N.Y. at 478, 128 N.E. at 883 (supply of water by a municipality is a sale of goods within the meaning of the Uniform Sales Act).

55 413 Pa. 415, 197 A.2d 612 (1964).

56 *Id.* at 420, 197 A.2d at 614.

57 *Id.* *See also* *Troszynski v. Commonwealth Edison Co.*, 42 Ill. App. 3d 925, 356 N.E.2d 926 (1976) (assuming that a products liability action was proper in suit against electrical company for injury caused by uninsulated wire in meter box); *Balthazor v. B & B Boiler & Supply Co.*, 169 Kan. 188, 217 P.2d 906 (1950); *Kasey v. Suburban Gas Heat of Kennewick, Inc.*, 60 Wash. 2d 468, 374 P.2d 549 (1962) (assuming, without discussion, that warranty of fitness under Uniform Sales Act was applicable to the sale of propane gas); *Murphy v. Petrolane-Wyoming Gas Serv.*, 468 P.2d 969 (Wyo. 1970) (assuming, without discussion, that U.C.C. implied warranties were applicable to the sale of natural gas).

58 U.C.C. § 2-105(1).

59 "Identification" means the identification of the particular existing goods to which the contract refers. In the absence of express agreement, identification occurs when the contract is made, if it is for the sale of goods already existing and identified. If the sale is for future goods, identification occurs when the



because they are movable when they are drawn through the customer's meter, gas, electricity and water are goods. Utility contracts therefore involve the sale of goods, and the Code is the governing body of law.

*Helvey v. Wabash County REMC*<sup>60</sup> applied the literal approach to determine whether the Code statute of limitations or the longer statute of limitations for common law contracts should apply to the service of electricity. Noting that electricity is personal property capable of being owned, bartered, sold, stolen and taxed, the court held electricity to be goods within the meaning of the Code and thus applied the Code's shorter statute of limitations.<sup>61</sup> The court stated:

It is necessary for goods to be (1) a thing; (2) existing; and (3) movable, with (2) and (3) existing simultaneously. We are of the opinion that electricity qualifies in each respect. Helvey says it is not movable and in this respect we do not agree, if for no other reason than the monthly reminder from the electric company of how much current has passed through the meter. Logic would indicate that whatever can be measured in order to establish the price to be paid would be indicative of fulfilling both the existing and movable requirements.<sup>62</sup>

Under the literal approach, the sale and delivery of utility products is no more a service than is the sale and delivery of any other product.

The third approach, employed by most courts, applies or refuses to apply the Code by analogy. Although courts using this approach generally recognize some element of service in utility supply contracts, they consider the sales-service distinction to be irrelevant.

*Buckeye Union Fire Insurance Co. v. Detroit Edison Co.*<sup>63</sup> is a landmark case illustrating the analogical use of the Code. In *Buckeye*, the owners and insurers of a home destroyed by fire brought suit against an electrical company, alleging negligence and breach of the Code's warranties. The trial court granted a directed verdict in favor of the defendant on the warranty count, finding that electricity was a service to which the Code did not apply.<sup>64</sup> The appellate court, without explanation, agreed that electricity was not a "good" as defined by the Code.<sup>65</sup> Nevertheless, the court concluded that the product liability of sellers was not restricted to those situations covered by the Code.<sup>66</sup> It saw no reason why implied warranties should not apply to the sale of services as well as to the

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goods are shipped, marked or otherwise designated by the seller as goods to which the contract refers. U.C.C. § 2-501(1)(a), (b). A comment to this section states that "[i]t is possible for identification to be tentative or contingent . . . the general policy is to resolve all doubts in favor of identification." U.C.C. § 2-501, Official Comment 1.

60 151 Ind. App. 176, 278 N.E.2d 608 (1972).

61 *Id.* at 178-79, 278 N.E.2d at 610.

62 *Id. Accord*, *Hedges v. Public Serv. Co. of Ind., Inc.*, 396 N.E.2d 933 (Ind. App. 1979) (metered electricity sold in unmarketed state and passed into household electrical system is a "good," but 7200 volt electrical energy encountered in unmarketed state is not a "good" that defendant intended to sell); *Petroski v. Northern Ind. Pub. Serv. Co.*, 354 N.W.2d 736 (Ind. App. 1976) (electricity is a product that can be sold within the meaning of § 402A, but plaintiff's claim denied on grounds that electricity in power line had not been placed into stream of commerce) *Ransome v. Wisconsin Elec. Power Co.*, 275 N.W.2d 641 (Wis. 1979) (electricity a product subject to strict tort liability. *See also* Casenote, 7 U. RICH. L. REV. 405, 407-08 (1972) (arguing that a literal basis exists for holding electricity to be "goods" within U.C.C. definition).

63 38 Mich. App. 325, 196 N.W.2d 316 (1972), *appeal denied*, 393 Mich. 763 (1974). *See generally* Casenote, 7 U. RICH. L. REV. 405 (1972).

64 *Buckeye Union Fire Ins. Co. v. Detroit Edison Co.*, 38 Mich. App. at 328, 196 N.W.2d at 317.

65 *Id.*

66 *Id.*

sale of goods, especially where the production and sale of an inherently dangerous form of energy is involved.<sup>67</sup> Although the *Buckeye* court affirmed the directed verdict because the plaintiff failed to demonstrate a defect in the electricity,<sup>68</sup> the case stands for the proposition that implied warranties can attach to a utility supply contract even if the contract is deemed to be for services rather than for goods.<sup>69</sup> Similarly, another court has held that, even if the supply of utility products contains a service element, the transaction is sufficiently analogous to a sale of goods to justify application of the Code.<sup>70</sup>

Thus, the Code's application to utility supply contracts has been justified on three different bases, two of which seem valid. Certainly the argument that utility products meet the literal definition of "goods" under the Code is persuasive. Gas, water and electricity are tangible and corporeal personal property, as opposed to intangible property such as choses in action.<sup>71</sup> They are fairly described as movables, as opposed to non-movables like real property, and they are sold for a consideration to customers. The argument that the mere obligation to deliver tangible, movable goods to a customer's meter transforms a sale into a service is untenable; the same argument would not even be colorable for other types of goods.

Even if courts are troubled by the literal approach, it is reasonable to treat utility supply contracts as analogous to a sale of goods and to apply Code provisions by analogy. The problems arising between sellers and buyers in utility supply contracts are similar to those encountered in other commercial relationships. Problems of non-delivery, warranty, notice and unconscionability may even be magnified, both because utility products are necessary and potentially dangerous and because there is great disparity of bargaining power between seller and buyer. Applying the Code to the sale of utilities would serve the Code's policies of uniformity, expansion and modernization of commercial practices.<sup>72</sup>

## II. Implied Warranty and Strict Tort Liability Protection for Utility Consumers

Under the common law utility companies are not liable, in the absence of

67 *Id.* at 329, 196 N.W.2d at 317-18.

68 *Id.* at 331, 196 N.W.2d 319. *But see* *Ransome v. Wisconsin Elec. Power Co.*, 275 N.W.2d 641 (Wis. 1979) (finding a defect in the electricity under similar circumstances). *See* notes 130-57 *infra* and accompanying text for discussion of defectiveness in utility products.

69 *Accord*, *Kulhanjian v. Detroit Edison Co.*, 73 Mich. App. 347, 251 N.W.2d 580 (1977); *Williams v. Detroit Edison Co.*, 63 Mich. App. 559, 234 N.W.2d 702 (1975); *University of Pittsburgh v. Equitable Gas Co.*, 5 Pa. D. & C.3d 303 (C.P. Allegheny County 1978).

70 *See* *Genaust v. Illinois Power Co.*, 62 Ill. 2d 456, 343 N.E.2d 465 (1976); *Pioneer Hi-Bred Corn Co. v. Northern Ill. Gas Co.*, 61 Ill. 2d 6, 329 N.E.2d 228 (1975); *Cratsley v. Commonwealth Edison Co.*, 38 Ill. App. 3d 55, 347 N.E.2d 496 (1976); *Williams v. Detroit Edison Co.*, 63 Mich. App. 559, 234 N.W.2d 702 (1975); *Erwin v. Guadalupe Valley Elec. Co-op*, 505 S.W.2d 353 (Tex. App. 1974); *Kemp v. Wisconsin Elec. Power Co.*, 44 Wis. 2d 571, 172 N.W.2d 161 (1969). These cases generally involve power line injuries occurring without any sale of a utility product, and these courts have not discounted the possibility that product liability doctrines could apply to utility-supply contracts in an appropriate case. *Compare, e.g.*, *Ransome v. Wisconsin Elec. Power Co.*, 275 N.W.2d 641 (Wis. 1979); *Kemp v. Wisconsin Elec. Power Co.*, 44 Wis. 2d 571, 172 N.W.2d 161 (1969). *But see* *Wood v. Public Serv. Co.*, 114 N.H. 182, 317 A.2d 576 (1974) (refusal to extend strict liability unless some compelling policy advanced). Only one court explicitly based its refusal to extend strict tort liability to an electrical company on the ground that legislative decision-making was more appropriate because of the economic ramifications of such a doctrine. *Wirth v. Mayrath Indus., Inc.*, 278 N.W.2d 789, 793 (N.D. 1979).

71 *See* Comment 7 U. RICH. L. REV. 405, 407 (1972).

72 *See* U.C.C. § 1-102.

negligence, for injuries occasioned by the production and distribution of their products.<sup>73</sup> While some courts have said that public utilities owe a "high standard of care" in the production of their products,<sup>74</sup> the injured customer's way to recovery is not easy. A plaintiff must still prove that his injuries were caused by the utility company's wrongful act.

If the Code is applied to utility supply contracts, either literally or analogously, its provisions for express and implied warranties of quality will extend to utility consumers. An express warranty can be created by the seller's description of, or affirmation of fact about, goods which become part of the basis of the bargain.<sup>75</sup> Thus, a seller's advertisement<sup>76</sup> describing gas as "odorized" or water as "pure" would create an express warranty that the goods conform to the description. Although express warranties are possible in the utility setting, implied warranties of merchantability and fitness for a particular purpose will likely be encountered more frequently.

A warranty that goods sold are "merchantable" is implied in every sale of goods by a merchant.<sup>77</sup> While various definitions of merchantability are suggested by the Code,<sup>78</sup> the term is generally taken to mean that goods are fit for their ordinary purposes.<sup>79</sup> The warranty of fitness for a particular purpose, on the other hand, is not created unless the seller has reason to know the buyer's particular purpose for the goods and the buyer relies on the seller for the selection of goods suitable for that purpose.<sup>80</sup> Once made, this warranty guarantees that the goods will be fit for the buyer's particular purpose, regardless of the ordinary purposes for which such goods are used.<sup>81</sup>

If gas, electricity and water are considered "goods" under the Code, they are also likely to be considered "products" within section 402A of the *Restatement (Second) of Torts*.<sup>82</sup> Although existing outside the Code, strict tort liability

73 See, e.g., *Weissert v. City of Escanaba*, 298 Mich. 443, 299 N.W. 139 (1941); *Donovan v. Union Elec. Co.*, 454 S.W.2d 623 (Mo. App. 1970); *Roberts Realty Corp. v. City of Great Falls*, 160 Mont. 144, 500 P.2d 956 (1972); *Public Serv. Co. v. Sonagerra*, 208 Okla. 95, 253 P.2d 169 (1952); *Frisch v. Public Util. Dist. No. 1 of Snohomish County*, 8 Wash. App. 555, 507 P.2d 1201 (1973).

74 See, e.g., *Crosby v. Savannah Elec. & Power Co.*, 114 Ga. App. 193, 150 S.E.2d 563 (1966); *Nelson v. Iowa-Illinois Gas & Elec. Co.*, 160 N.W.2d 448 (Iowa 1968); *Royal Ins. Co. v. Fidelity & Cas. Co. of N.Y.*, 256 So. 2d 352 (La. App. 1971).

75 U.C.C. § 2-313. An express warranty can also be created by the seller's display of a sample or model which is made part of the basis of bargain.

76 Express warranties can be created by statements made in advertisements. See, e.g., *Filler v. Rayex Corp.*, 435 F.2d 336 (7th Cir. 1970).

77 U.C.C. § 2-314.

78 U.C.C. § 2-314(2) provides:

- (2) Goods to be merchantable must be at least such as
  - (a) pass without objection in the trade under the contract description; and
  - (b) in the case of fungible goods, are of fair average quality within the description; and
  - (c) are fit for the ordinary purposes for which such goods are used; and
  - (d) run, within the variations permitted by the agreement, of even kind, quality and quantity within each unit and among all units involved; and
  - (e) are adequately contained, packaged, and labeled as the agreement may require; and
  - (f) conform to the promises or affirmations of fact made on the container or label if any.

79 See, e.g., *Huebert v. Federal Pacific Elec. Co.*, 208 Kan. 720, 494 P.2d 1210 (1972). See also *WHITE & SUMMERS*, *supra* note 23, § 9-7 at 293.

80 U.C.C. § 2-315. See also *Catania v. Brown*, 4 Conn. Cir. 344, 231 A.2d 668 (1967); *Nelson v. Dykes Lumber Co.*, 52 A.D.2d 808, 383 N.Y.S.2d 335 (1976).

81 See, e.g., *Bosway Tube & Steel Corp. v. McKay Mach. Co.*, 65 Mich. App. 426, 237 N.W.2d 488 (1975). See also *WHITE & SUMMERS*, *supra* note 23, § 9-9 at 297.

82 RESTATEMENT (SECOND) OF TORTS § 402A (1965) provides:

- (1) One who sells any product in a defective condition unreasonably dangerous to the user or consumer or to his property is subject to liability for physical harm thereby caused to the ultimate user or consumer, or to his property, if

under section 402A is so similar in content to the implied warranty of merchantability that several courts consider them almost co-extensive.<sup>83</sup>

The practical significance of the warranty and strict tort liability doctrines is that recovery of damages under each is not contingent upon proof of negligence.<sup>84</sup> Warranties of quality and strict tort liability can thus be described as result-oriented rather than process-oriented;<sup>85</sup> they look to the quality of the product received by the consumer rather than to whether the seller's wrongdoing caused the injury.<sup>86</sup> For example, if a water company supplies contaminated drinking water to a consumer, a court's determination of liability for breach of warranty would turn on the quality of the water rather than on the reasonableness of the water company's conduct.<sup>87</sup> Such an orientation will be a boon to consumers of utility products, since the technological and marketing complexity of utility products often makes proof of a utility company's negligence a difficult task.

The application of product liability doctrines to utility products does not mean, however, that every consumer injured by a utility company's operations can recover damages for breach of warranty. Two questions arise when these doctrines are applied to utilities. First, which utility company activities give rise to implied warranties and strict tort liability? Second, what makes a utility product defective or unmerchantable?

### A. Activities Subject to Implied Warranty and Strict Tort Liability Doctrines

Injuries occasioned by a utility company's operations range from those

- (a) the seller is engaged in the business of selling such a product, and
- (b) it is expected to and does reach the user or consumer without substantial change in the condition in which it is sold.
- (2) The rule stated in Subsection (1) applies although
  - (a) the seller has exercised all possible care in the preparation and sale of his product, and
  - (b) the user or consumer has not bought the product from or entered into any contractual relation with the seller.

83 See *Westric Battery Co. v. Standard Elec. Co.*, 482 F.2d 1307, 1315 (10th Cir. 1973); *Greeno v. Clark Equip. Co.*, 237 F. Supp. 427, 429 (N.D. Ind. 1965); *Realmuto v. Straub Motors, Inc.*, 65 N.J. 336, 343, 322 A.2d 440, 443 (1974). See also *White & Summers*, *supra* note 23, § 9-8 at 295 (while § 402A requires product to be "unreasonably dangerous" in addition to being defective and does not apply to purely economic injury, § 402A standard is nearly synonymous with U.C.C. standard of merchantability); *Dickerson, The ABC's of Products Liability—With a Close Look at Section 402A and the Code*, 36 TENN. L. REV. 439, 442-44 (1969) (§ 402A and Code approaches substantively the same, although § 402A is free of limitations such as privity, disclaimer and notice); *Shanker, A Reexamination of Prosser's Products Liability Crossword Game: The Strict or Stricter Liability of Commercial Code Sales Warranty*, 29 CASE W. RES. L. REV. 550 (1979) (no substantial differences exist between the two systems).

84 See, e.g., *Tinnerholm v. Parke Davis & Co.*, 285 F. Supp. 432, 440 (S.D.N.Y. 1968); *Piercefield v. Remington Arms Co.*, 375 Mich. 85, 96, 133 N.W.2d 129, 134 (1965); *Kopet v. Klein*, 275 Minn. 525, 529, 148 N.W.2d 385, 389 (1967); *Hollinger v. Shoppers Paradise of N.J., Inc.* 134 N.J. Super. 328, 336, 340 A.2d 687, 692 (1975); *United Pacific Ins. Co. v. Balcrank, Inc.*, 175 Ohio St. 267, 271, 193 N.E.2d 920, 923 (1963); *Marathon Battery Co. v. Kilpatrick*, 418 P.2d 900, 911 (Okla. 1965). See *Prosser, The Fall of the Citadel (Strict Liability to the Consumer)*, 50 MINN. L. REV. 791, 802 (1966); *Shanker, supra* note 83, at 559-61.

85 See *MacDougall v. Ford Motor Co.*, 214 Pa. Super. 384, 391, 257 A.2d 676, 680 (1969). See also *Singal, supra* note 4, at 870.

86 See *Shanker, supra* note 83, at 561:

The words "strict liability" are nothing more than a shorthand way of indicating what professional sellers knew long before Professor Prosser, strict tort, and Restatement Section 402A appeared on the scene: namely, they are liable for breach of the merchantability (or any other) warranty, even though that breach was not due to their negligence or other fault.

87 Compare, e.g., *Canavan v. City of Mechanicville*, 229 N.Y. 473, 128 N.E. 882 (1920) with *Coast Laundry, Inc. v. Lincoln City*, 9 Or. App. 521, 497 P.2d 1224 (1972) and *Moody v. City of Galveston*, 524 S.W.2d 583 (Tex. Civ. App. 1975).

caused by equipment used to distribute utility products, such as electrical power lines, to those caused by the direct sale of a defective utility product, such as contaminated water. A utility company, like manufacturers of other types of goods, is not subject to implied warranty and strict tort liability for all of its activities.

The implied warranty of merchantability imposes liability on a merchant-seller where goods are unmerchantable at the time of the sale.<sup>88</sup> Similarly, section 402A requires that the seller be engaged in the business of selling the goods,<sup>89</sup> and that the goods be defective at the time they leave the seller's hands.<sup>90</sup> Many courts subject sellers to liability without proof of negligence, even in the absence of a technical sale, when the seller places defective goods in the "stream of commerce."<sup>91</sup> Thus, a utility company will be subject to implied warranty and strict tort liability only when: (1) injury has resulted from a product that the utility company is in the business of selling; and (2) the product has been sold or placed in the stream of commerce<sup>92</sup> in a defective condition. The questions then become: (1) what product is a utility company in the business of selling, and (2) when does a utility product enter the stream of commerce?

A utility company is clearly in the business of selling to consumers its particular product—gas, electricity or water—and this product enters the stream of commerce when it passes through the customer's meter.<sup>93</sup> Thus, implied warranty and strict tort liability doctrines apply to the direct sale to a consumer of a defective utility product, such as drinking water intermingled with flammable gas,<sup>94</sup> excessive voltage passing into a residence through the customer's meter,<sup>95</sup> or gas containing liquid hydrocarbons.<sup>96</sup>

Although the direct supply cases exemplify the proper application of implied warranty and strict tort liability, there are numerous cases in which injury results from a consumer's encounter with a utility product in an "unmarketed and unmarketable state."<sup>97</sup> These cases normally arise when a utility product "escapes" because of a defect in its container or covering. The most common fact pattern involves injuries resulting from accidental contact with electrical power lines.

There are two problems with applying product liability doctrines to these cases. First, the injury results from defects in equipment which is not sold to

88 U.C.C. § 2-314.

89 RESTATEMENT (SECOND) OF TORTS § 402A, Comment f (1965).

90 RESTATEMENT (SECOND) OF TORTS § 402A, Comment g (1965). See also *Lindsay v. McDonnell Douglas Aircraft Corp.*, 460 F.2d 631 (8th Cir. 1972); *Holcomb v. Cessna Aircraft Co.*, 439 F.2d 1150 (5th Cir. 1971).

91 See, e.g., *First Natl. Bank v. Cessna Aircraft Co.*, 365 So. 2d 966 (Ala. 1978); *Fulbright v. Klamath Gas Co.*, 271 Or. 449, 533 P.2d 316 (1975). See generally Comment, *Strict Products Liability for Injuries Prior to Sale or Delivery: A Proposed "Stream of Commerce" Test*, 17 DUQ. L. REV. 799 (1979).

92 See *Petroski v. Northern Ind. Pub. Serv. Co.*, 354 N.E.2d 736, 747 (Ind. App. 1976).

93 *Id.*; *Williams v. Detroit Edison Co.*, 63 Mich. App. 559, 568, 234 N.W.2d 702, 707 (1975), appeal denied, 395 Mich. 800 (1975). See also Note, *supra* note 8, at 791.

94 See *Moody v. City of Galveston*, 524 S.W.2d 583 (Tex. Civ. App. 1975) (§ 402A applied to drinking water intermixed with flammable gas).

95 See *Ransome v. Wisconsin Elec. Power Co.*, 87 Wis. 2d 605 275 N.W.2d 641 (1979) (§ 402A applied when excessive voltage passed through customer's meter and destroyed house).

96 See *Murphy v. Petrolane-Wyoming Gas Serv.*, 468 P.2d 969 (Wyo. 1970) (U.C.C. warranties applied where fire caused by liquid hydrocarbons in gas lines).

97 *Hedges v. Public Serv. Co.*, 396 N.E.2d 933, 935 (Ind. App. 1979).

consumers. Second, the utility product causes the injury before any sale has been attempted and, generally, when the product is not yet in its finished state. Most courts faced with implied warranty or strict tort liability claims in these cases have therefore held the doctrines inapplicable on one of two grounds: (1) the utility product had not entered the stream of commerce;<sup>98</sup> or (2) the utility company was not in the business of selling its equipment.<sup>99</sup>

A broader view of both the product that the utility company is in the business of selling and of the stream commerce concept would, however, open the door for strict liability in these "pre-sale" cases. Thus, strict liability doctrines would be applicable if a company's defective distribution equipment were considered part of its product, and if such product were considered to have entered the stream of commerce when placed in a position that threatens harm to the public.

The requirement that a seller be in the business of selling the injury-causing product was intended to exempt the occasional seller, such as a housewife selling a jar of jam to a neighbor, from the imposition of liability without fault.<sup>100</sup> The rationale for the exemption is that the buyer relies less on the non-merchant seller than on the merchant seller.<sup>101</sup> A comment to section 402A states:

The basis for the rule is the ancient one of the special responsibility for the safety of the public undertaken by one who enters into the business of supplying human beings with products which may endanger the safety of their persons and property, and the forced reliance upon that undertaking on the part of those who purchase such goods.<sup>102</sup>

The application of implied warranty and strict tort liability doctrines to injuries caused by a utility company's defective distribution equipment is consistent with this policy. Although a utility company does not sell poles, wires, conduits or pipes to consumers, such equipment is an integral part not only of the company's commercial venture but also of its finished product, in that "it is impossible for the consumer to purchase a 'gallon' of [natural] gas or electricity."<sup>103</sup> The consumer is necessarily exposed to the risks of the entire system.<sup>104</sup> Unlike equipment used to distribute other products, utility company distribution equipment is omnipresent. Moreover, a consumer cannot affect the condition of this equipment, but must passively rely upon its safety.<sup>105</sup> The con-

98 See *Genaust v. Illinois Power Co.*, 62 Ill. 456, 343 N.E.2d 465 (1976); *Hedges v. Public Serv. Co.*, 396 N.E.2d 933 (Ind. App. 1979); *Williams v. Detroit Edison Co.*, 63 Mich. App. 559, 234 N.W.2d 702, *appeal denied*, 395 Mich. 800 (1975); *Kemp v. Wisconsin Elec. Power Co.*, 44 Wis. 2d 571, 172 N.W.2d 161 (1969). See also Note, *supra* note 8, at 791-96. But see *Kulhanjian v. Detroit Edison Co.*, 73 Mich. App. 347, 251 N.W.2d 580 (1977); *University of Pittsburgh v. Equitable Gas Co.*, 5 Pa. D. & C.3d 303 (C.P. Allegheny County 1978).

99 See, e.g., *Genaust v. Illinois Power Co.*, 62 Ill. 2d 456, 343 N.E.2d 465 (1976); *Pioneer Hi-Bred Corn Co. of Ill. v. Northern Ill. Gas Co.*, 61 Ill. 2d 6, 329 N.E.2d 228 (1975); *Cratsley v. Commonwealth Edison Co.*, 38 Ill. App. 3d 55, 347 N.E.2d 496 (1976); *Erwin v. Guadalupe Valley Elec. Co-op*, 505 S.W.2d 353 (Tex. Civ. App. 1974). See also *Casene*, 26 DEPAUL L. REV. 401 (1977).

100 See RESTATEMENT (SECOND) OF TORTS § 402A Comment f (1965).

101 See Prosser, *The Fall of the Citadel (Strict Liability to the Consumer)*, 50 MINN. L. REV. 791, 814 (1966).

102 RESTATEMENT (SECOND) OF TORTS § 402A Comment f (1965).

103 Comment, *supra* note 91, at 811 n.61.

104 *Id.*

105 See *University of Pittsburgh v. Equitable Gas Co.*, 5 Pa. D. & C.3d 303 (C.P. Allegheny County 1973).

sumer's reliance on the safety of distribution equipment is no less than his reliance on the safety of the final product entering his home or business through his meter.

Assuming that distribution equipment is part of the product sold by a utility company, what of the argument that product liability doctrines are inapposite because the product has not entered the stream of commerce? Although not clearly defined by courts,<sup>106</sup> the phrase "stream of commerce" has come to include the exposure of goods to the public by means of product demonstrations,<sup>107</sup> free samples, the leasing and bailing of the goods, or other means that fall short of a technical sale.<sup>108</sup> The "sin" of unleashing defective goods in the stream of commerce lies in placing such goods where they can cause harm to unsuspecting consumers.<sup>109</sup>

One commentator has argued against the requirement that products be physically transferred before they are considered to have entered the stream of commerce, citing the broad policy foundations of product liability doctrines.<sup>110</sup> The commentator offers the following test for determining when a product enters the stream of commerce:

[A] product is in the stream of commerce when it has been placed or situated in such a manner that danger to the consuming public in general or certain persons in particular exists. One or all of the following factors may be considered in determining the question of whether a product meets this test: (1) whether the manufacturer has completed the process of manufacture, including testing of the product in question (except testing in areas in which the danger to the consuming public in general or to specific non-employees in particular exists would not insulate the manufacturer from liability); (2) whether the product is being used at the time of the injury; (3) the physical location of the product at the time of the injury (in other words, in transit, on the manufacturer's plant, etc.); (4) whether a danger to the consuming public in general or to certain reasonably foreseeable persons in particular has arisen from the product's physical location at the time of the injury; (5) whether a contract for the sale of the product has been executed; and (6) the hazardous nature of the product.<sup>111</sup>

If placing goods in the stream of commerce means placing goods where they expose the public to a high risk of harm, a utility company's defective equipment is in the stream of commerce.

106 Comment, *supra* note 91, at 816, 822.

107 See *First Nat'l Bank of Mobile v. Cessna Aircraft Co.*, 365 So. 2d 966 (Ala. 1978).

108 See Reitzel, *The Exploding Bottle Situation: Is There a Better Basis for Shopper Protection?*, 15 A.B.L.J. 187, 205 n.52 (1977).

109 See *Fulbright v. Klamath Gas Co.*, 271 Or. 449, 533 P.2d 316 (1975).

110 See Comment, *supra* note 91, at 816-18:

If the purpose of strict liability is to protect "injured persons powerless to protect themselves," a theory the drafters of section 402A adopted, then attaching some transcendent significance to the transfer or delivery of the product contravenes that purpose. Applying a technical "possession" test has the effect of arbitrarily denying strict liability to an injured party simply because he or she was in the wrong place at the wrong time, while sustaining the cause of action for a person injured by the same defect on the other side of the "magic" time of exchange or transfer of possession. Once a product has been placed in such a manner that potential harm to the consuming public from a defect in the product has arisen, human beings are vulnerable to injury. The point in time of sale or delivery, as a triggering mechanism for strict liability, is far too inflexible a test in light of the broad remedial purposes of the strict liability doctrine. *Id.* at 817-18.

111 *Id.* at 823-24.

Even if courts prove reluctant to impose implied warranty and strict tort liability for all injuries caused by utility companies' defective distribution equipment, they might still impose liability for injuries caused by equipment located on customers' private property. For example, when an uninsulated wire or meter box is placed on his property, a customer's exposure to injury is increased because of his possession of the defective equipment. Two cases seem to support this approach.

In *Troszynski v. Commonwealth Edison Co.*,<sup>112</sup> the plaintiff's son accidentally threw a tennis ball through the meter box on the plaintiff's building. The plaintiff reached into the meter box to retrieve glass that had been broken and was severely burned by uninsulated wires. The court assumed without discussion that a product liability action was proper, and held the electrical company liable since there was no warning of danger on the meter box.<sup>113</sup> Similarly, in *Kulhanjian v. Detroit Edison Co.*<sup>114</sup> a boy was injured when he touched an uninsulated wire on the roof of the building on which he was working. The court held that, since the wire was attached to a pole on private as opposed to public property, an implied warranty existed as to the manner in which the wiring was installed.<sup>115</sup> Unfortunately, both *Troszynski* and *Kulhanjian* lack instructive discussion of the policy foundations for their holdings. Nevertheless, the application of product liability doctrines in these cases demonstrates the point that defective equipment placed on private property should give rise to greater liability since it threatens greater harm.

A partial analogy can be seen in cases applying strict liability to licensors. In *Garcia v. Halsett*,<sup>116</sup> a boy whose arm became entangled in a defective washing machine in a laundromat recovered against the laundromat owner on a theory of strict liability. Although the owner was not in the business of selling washing machines, the court observed that a licensor of personal property, like a manufacturer or retailer, provides a product for the public's use and plays an integral role in the marketing of the product.<sup>117</sup> Strict tort liability has also been applied against a trademark licensor,<sup>118</sup> a landlord for a defective heating system in leased premises,<sup>119</sup> an owner of a "you-pick-it" orchard for a defective ladder supplied to customers,<sup>120</sup> and a vessel owner for a defective vehicle on a vessel he had supplied.<sup>121</sup>

There is, however, a factual distinction between these licensor cases and cases involving utility companies. Whereas the product supplied in the licensor cases was intended to be used by the injured party, utility companies do not supply their conduits or other equipment for use by others. Such companies do, however, install their equipment on private property and in other places where it may be unintentionally used or touched.

Courts imposing strict liability on licensors have downplayed the precise

112 42 Ill. App. 3d 925, 356 N.E.2d 926 (1976).

113 *Id.* at 929, 356 N.E.2d at 932.

114 73 Mich. App. 347, 251 N.W.2d 580 (1977).

115 *Id.* at 356, 251 N.W.2d at 584.

116 3 Cal. App. 3d 319, 82 Cal. Rptr. 420 (1970).

117 *Id.* at 325-26, 82 Cal. Rptr. at 423.

118 *Kasel v. Remington Arms Co.*, 24 Cal. App. 3d 711, 101 Cal. Rptr. 314 (1972).

119 *Golden v. Conway*, 55 Cal. App. 3d 948, 128 Cal. Rptr. 69 (1976).

120 *Gabbard v. Stephenson's Orchard, Inc.*, 565 S.W.2d 753 (Mo. App. 1978).

121 *Streach v. Associated Container Trans., Ltd.*, 388 F. Supp. 935 (C.D. Cal. 1975).



legal relationship between plaintiff and defendant, and have emphasized instead the defendant's role in making the defective product available to the public and the public's inability to protect itself from such products.<sup>122</sup> As one court put it:

It is the defendant's participatory connection, for his personal profit or other benefit, with the injury-producing product and with the enterprise that created customer demand for and reliance on the product (and not the defendant's legal relationship (such as agency) with the manufacturer or other entities involved in the manufacturing-market system) which calls for the imposition of strict liability.<sup>123</sup>

This reasoning applies with equal force to defective utility equipment. In many cases, the injured customer is unaware of the presence on his property of a leaky gas pipe or an uninsulated wire. He may be unaware of the arcing potential of electricity.<sup>124</sup> In any case, he can neither affect the quality of the equipment's installation nor, given the indispensability of utility products, keep the equipment off his property. The utility company uses its equipment not for an altruistic purpose, but for the profit of its overall enterprise.<sup>125</sup> The analogy of utility company equipment to machinery used by a manufacturer in his factory<sup>126</sup> is not apt. Factory machinery is not buried beneath and strung over every home and business in the country. It is not in a position where, if defective, it would likely cause injury to unintentional users.

It is unlikely, however, that courts will rush to subject utility companies to implied warranty and strict tort liability for injuries resulting from equipment failure occurring before the utility product's sale. Although such an approach may be justifiable on policy grounds, it would result in a higher standard of legal responsibility for sellers of utility products than is presently applied to sellers of other goods.<sup>127</sup> In addition, courts will probably be concerned about the costs of imposing such liability in the pre-sale context because injuries in that context are so numerous.<sup>128</sup> Product liability doctrines will more likely be applied in cases where a utility company places defective equipment on private property, since the greater likelihood of injuries from such equipment warrants imposing a standard of legal responsibility that creates a greater incentive to make such equipment safe.<sup>129</sup> Finally, product liability doctrines will almost certainly be applied to the direct sale of utility products to consumers.

<sup>122</sup> *Id.* at 940-42; *Golden v. Conway*, 55 Cal. App. 3d at 962-63, 128 Cal. Rptr. at 77-78; *Kasel v. Remington Arms Co.*, 24 Cal. App. 3d at 725, 101 Cal. Rptr. at 323; *Gabbard v. Stephenson's Orchard, Inc.*, 565 S.W.2d at 755-57.

<sup>123</sup> *Kasel v. Remington Arms Co.*, 24 Cal. App. 3d at 725, 101 Cal. Rptr. at 323.

<sup>124</sup> *But see* *Genaust v. Illinois Power Co.*, 62 Ill. 2d 456, 466, 343 N.E.2d 465, 471 (1976); *Stambaugh v. Central Ill. Light Co.*, 42 Ill. App. 3d 582, 587, 356 N.E.2d 148, 151-52 (1976) (arcing capacity of electricity a matter of common knowledge).

<sup>125</sup> One commentator has argued that the application of strict liability to all defective business premises serves the doctrine's twin goals of accident reduction and cost distribution, and that cases like *Garcia v. Halsett*, 3 Cal. App. 3d 319, 82 Cal. Rptr. 420 (1970) foreshadow such a result. *Urson, Strict Liability for Defective Business Premises—One Step Beyond Rowland and Greeman*, 22 U.C.L.A. L. REV. 820 (1975).

<sup>126</sup> Note, *supra* note 8, at 794-95.

<sup>127</sup> See, e.g., *Reitzel, The Exploding Bottle Situation: Is There a Better Basis for Shopper Protection?*, 15 A.B.L.J. 187 (1977) for a discussion of the machinations that courts have engaged in to subject storeowners to warranty and strict liability in cases where injury is caused by a defective product before it is sold.

<sup>128</sup> See Note, *supra* note 8, at 798-801.

<sup>129</sup> For an excellent discussion of the policy of creating incentives for safety, see *Johnson, Product Liability "Reform": A Hazard to Consumers*, 56 N.C. L. REV. 677 (1978).

The applicability of such doctrines is, however, only the first hurdle that an injured consumer must surmount. He must also prove that his injuries resulted from a defective or unmerchantable utility product.

### B. *The Meaning of "Defect" as Applied to Utility Products*

Commentators on the subject of defective products agree that the courts' current application of the term "defect" leaves much to be desired.<sup>130</sup> The lack of consistency among courts defining the term is surprising, since the "defect" issue is the most hotly contested issue in products liability cases.<sup>131</sup>

Both the implied warranty and strict tort liability doctrines set forth standards below which a product's quality may not fall without giving rise to liability for resulting injuries.<sup>132</sup> Although this substandard condition is termed "unmerchantable" under the Code and "defective" under section 402A, both provisions require at bottom that something be wrong with the product<sup>133</sup> in its manufacture, design, or warnings.<sup>134</sup> Mere imperfection is an insufficient basis for finding a product unmerchantable or defective.<sup>135</sup>

As Dean Keeton has pointed out, although an injured plaintiff is no longer required to impugn the product's maker, he must still impugn the product.<sup>136</sup> Courts today are consequently working to flesh out a standard of "the reasonable product" in products liability cases, just as they have for so long attempted to flesh out a standard of "the reasonable man" in negligence cases.

Three tests for defectiveness or unmerchantability have been used. First, courts in warranty cases frequently state that an unmerchantable product is one "not fit for the ordinary purposes for which such goods are used."<sup>137</sup> Under this test, the purpose for which the goods were being used at the time of injury must have been reasonably foreseeable.<sup>138</sup> A variant of this test looks to whether the product has deviated from the safety norm expected of such products.<sup>139</sup> The second test, set forth in the *Restatement (Second) of Torts*, specifies that the product must have been defective beyond the reasonable contemplation of the intended user.<sup>140</sup> Under this test, a "defect" generic to the goods is assumed to be contemplated by the user.<sup>141</sup> Thus, the fact that electricity elec-

130 U.S. DEP'T OF COMMERCE, INTERAGENCY TASK FORCE ON PRODUCT LIABILITY—FINAL REPORT, ch.2 at 6-8 (1977) [hereinafter cited as FINAL REPORT]; Keeton, PRODUCT LIABILITY AND THE MEANING OF DEFECT, 5 ST. MARY'S L.J. 30 (1973); Phillips, THE STANDARD FOR DETERMINING DEFECTIVENESS, 46 U. CIN. L. REV. 101 (1977); Traynor, THE WAYS AND MEANINGS OF DEFECTIVE PRODUCTS AND STRICT LIABILITY, 32 TENN. L. REV. 363 (1965).

131 Keeton, *supra* note 130, at 32.

132 See Dickerson, *supra* note 83, at 443.

133 See Traynor, *supra* note 130, at 366. See also Shanker, *supra* note 83, at 555-59, in which the author contends that the quality standards for U.C.C. warranties are equal to or higher than the quality standards of strict tort.

134 *Id.* at 33-34.

135 See, e.g., Sessa v. Riegle, 427 F. Supp. 760, 769-70 (E.D. Pa. 1977), *aff'd*, 568 F.2d 770 (3d Cir. 1978).

136 Keeton, *supra* note 130, at 33.

137 See, e.g., Williams v. Stuart Motor Co., 494 F.2d 1074 (D.C. Cir. 1974); Klein v. Continental Emsco Co., 310 F. Supp. 413 (E.D. Tex. 1970), *aff'd*, 445 F.2d 629 (5th Cir. 1971); Huebert v. Federal Pac. Elec. Co., 208 Kan. 720, 494 P.2d 1210 (1972); McDonald v. Ford Motor Co., 42 Ohio St. 2d 8, 326 N.E.2d 252 (1975).

138 See Grant v. National Acme Co., 351 F. Supp. 972, 975 (W.D. Mich. 1972). See also Keeton, *supra* note 130, at 36.

139 For a brief discussion of this test, see Note, *supra* note 8, at 786.

140 See Keeton, *supra* note 130, at 37.

141 See Traynor, *supra* note 130, at 370.

trocutes or gas asphyxiates does not make these products defective. A third test considers a product defective if it is unreasonably dangerous as marketed.<sup>142</sup> In determining whether a product is unreasonably dangerous, courts balance the magnitude of the perceivable danger against the social utility of the product and the feasibility of making a safer product.<sup>143</sup>

Although it is difficult to create a uniform standard for defectiveness of products generally, it is especially difficult to do so where utility products are concerned. The meaning of defect in utility product cases depends upon the type of accident involved. If an injury results directly from gas, electricity or water supplied to a customer, the "unfit for ordinary purposes" or "deviation from the norm" tests could be readily applied. An action for breach of the warranty of fitness for a particular purpose would also be appropriate, because a utility company has reason to know of the customer's purpose and of his reliance on the utility to provide a product suitable for that purpose.<sup>144</sup> If an electric company allows excess voltage to pass through a customer's meter, causing a fire,<sup>145</sup> the electric charge would not differ scientifically from other electricity. As supplied, however, the electricity would be unfit for the buyer's particular purpose and for the ordinary purpose of residential use. Similarly, electricity of insufficient voltage that burns out a machine, gas supplied under improper pressure or mixed with an untoward element,<sup>146</sup> or contaminated water<sup>147</sup> would be "defective" under these tests.

The question of defect is more difficult to resolve in the consumer's favor, however, when injury results, not from the utility product supplied to the consumer, but from some element of the utility company's distribution system.<sup>148</sup> Because utility companies are not considered to be involved in ultrahazardous undertakings, and hence are not subject to strict liability,<sup>149</sup> recovery by the consumer is precluded unless a defect is found in the distribution equipment. The determination of whether such equipment is defective depends upon the type of defect alleged.

The three tests for defectiveness discussed above will most easily be satisfied when the equipment defect relates to its manufacture. If the equipment is flawed in a way not characteristic of similar utility equipment, it should be held defective under all three tests. For example, a leaking gas main is unfit for its ordinary purposes, dangerous beyond the reasonable expectations of users and consumers, and unreasonably dangerous.

The plaintiff's case is more difficult, however, when the injury-causing equipment is of the same quality as other such equipment. The plaintiff must then allege a defect in design or a defect caused by failure to give an ap-

142 See Keeton, *supra* note 130, at 37-38, citing *Ross v. Up-Right, Inc.*, 402 F.2d 943, 946 (5th Cir. 1968) and *Metal Window Prods. Co. v. Magnusen*, 485 S.W.2d 355 (Tex. Civ. App. 1972).

143 See Keeton, *supra* note 130, at 37-38.

144 U.C.C. § 2-315. See notes 80-87 *supra* and accompanying text.

145 *Ransome v. Wisconsin Elec. Power Co.*, 275 N.W.2d 641 (Wis. 1979).

146 *Murphy v. Petrolane-Wyoming Gas Serv.*, 468 P.2d 969 (Wyo. 1970).

147 *Moody v. City of Galveston*, 524 S.W.2d 583 (Tex. Civ. App. 1975).

148 See Comment, *supra* note 91, at 811-15; Note, *supra* note 8, at 784-91.

149 See *McKenzie v. Pacific Gas & Elec. Co.*, 200 Cal. App. 2d 731, 19 Cal. Rptr. 628 (1962); *Hedges v. Public Serv. Co.*, 396 N.E.2d 933 (Ind. App. 1979). The refusal to find an ultrahazardous activity has been based on one of two grounds: that utility companies' activities are not unusual or that the cost of absolute liability would be too high. *Wirth v. Mayrath Indus., Inc.*, 278 N.W.2d 789 (N.D. 1979); *Brigham v. Moon Lake Elec. Ass'n*, 24 Utah 2d 292, 470 P.2d 393 (1970).

propriate warning. Suppose, for example, that a homeowner putting a new roof on his house sees electrical power lines strung over the house but is unaware that the lines are not insulated. When he places his metal ladder near one of the wires, electrical current arcs from the wire onto the ladder and electrocutes him. Is the electric company's equipment defective?

Under a "deviation from the norm" standard, the wire would not be defective provided its placement and condition is as good as the placement and condition of similar equipment. The plaintiff could allege, however, that the placement of uninsulated wires over a house constitutes a design defect because such wires are unsafe for their foreseeable purposes. Although the ordinary purpose of such wires is to transmit electricity, plaintiff could argue that the close proximity of humans to the wire was foreseeable, and that products to be merchantable must be not only useful for their foreseeable purposes, but also safe for such purposes.<sup>150</sup>

The third test for defectiveness, in which the danger of harm is balanced against the feasibility of correcting the danger and the social utility of the defendant's activities, is less promising for the plaintiff. If equipment is placed so that a member of the public is likely to come in contact with it, the danger of harm is high. On the other hand, so is the social utility of electricity. Moreover, the cost of insulating or burying all wires is extremely high, so that corrective actions would be economically unfeasible. Under the third test,<sup>151</sup> then, the uninsulated wires would not be unreasonably dangerous.

The failure to warn of foreseeable danger is a third possible defect. A product may be considered defective for failure to warn even though the underlying danger cannot feasibly be eliminated.<sup>152</sup> However, a seller has no duty to warn of obvious dangers.<sup>153</sup> Although the dangers of high-voltage electricity are well-known, the fact that a given wire is uninsulated may not be known. And, although at least one court would disagree,<sup>154</sup> the arcing capacity of electricity may not be a matter of common knowledge. At the same time, the possibility that a homeowner might accidentally touch an uninsulated wire placed over his home seems reasonably foreseeable.<sup>155</sup> If a warning were posted that the wire was uninsulated and that electricity could arc if conductive material were placed within a certain distance, harm to our homeowner might have been prevented. The cost of warning homeowners is not as high as the cost of insulating or burying wires, and such warnings would prevent harm in many cases. Thus, equipment placed where it will likely do harm if touched (*e.g.*, on private property, within easy reach of unsuspecting users) could be considered defective if not accompanied by adequate warnings.

150 Huebert v. Federal Pac. Elec. Co., 208 Kan. 720, 723, 494 P.2d 1210, 1214 (1972).

151 See Keeton, *supra* note 130, at 37-38. See also FINAL REPORT, *supra* note 130, ch. 2 at 6-12, for a discussion of the balancing approach to determining defectiveness of design and the factors that have been offered for consideration in the balancing process.

152 See Phillips, *supra* note 130, at 106.

153 See Posey v. Clark Equip. Co., 409 F.2d 560 (7th Cir. 1969), *cert. denied*, 396 U.S. 940 (1969); Keeton, *Products Liability—Inadequacy of Information*, 48 TEX. L. REV. 398, 399-400 (1970).

154 See Stambaugh v. Central Ill. Light Co., 42 Ill. App. 3d 582, 587, 356 N.E.2d 148, 152 (1976) (arcing capacity of electricity a matter of common knowledge).

155 As a general rule, the threatened harm must have been reasonably foreseeable before a product will be considered defective for failure to warn. See 1 L. FRUMER & M. FRIEDMAN, *PRODUCTS LIABILITY* § 8.03[1], at 161-64 (1976).

However, it is difficult to see how the application of strict liability principles would enhance consumer protection in such a situation. Whether the product was defective because not accompanied by adequate warnings and whether the utility company was negligent in failing to warn are practically coterminous questions.<sup>156</sup> Both questions require a determination of whether the product presented an unreasonable risk to the unwarned public.<sup>157</sup> Assuming that a utility company would be held strictly liable for failure to warn of only knowable risks, its responsibility for warning of defects under implied warranty and strict tort liability doctrines would be no greater than its current responsibility under common law negligence.

### C. Summary

The appropriateness of applying implied warranty and strict tort liability doctrines to injury-causing utility products depends upon the circumstances of the injury. Product liability doctrines are easily applied to cases in which a defective utility product is supplied to a customer's meter, since those cases involve the release of a dangerous product, in its finished state, into the stream of commerce.

Although few courts have been willing to so hold,<sup>158</sup> it is arguable that product liability doctrines should also extend to injuries caused by a utility company's defective distribution equipment.<sup>159</sup> Such an extension would require that distribution equipment be considered part of the product sold by the utility company—a proposition most courts have rejected<sup>160</sup>—so that defective equipment would give rise to liability even where the gas, electricity, or water itself is not defective. The extension of these doctrines would further their three objectives—compensating the injured, providing incentives for increased product safety, and allocating the costs of the injury to the party best able to bear them.<sup>161</sup> It would not, however, accomplish these objectives without cost.

Products liability is a double-edged sword. While it shifts risks away from the injured party and redistributes them among all users of a product, it also raises the cost of the product for all consumers.<sup>162</sup> This may be acceptable for products which a consumer can decide to buy or not to buy, but most consumers of utility products have neither a choice in the matter nor the ability to choose between various suppliers. As one commentator remarked, "[t]he high cost of products to the many quite possibly may produce consequences more detrimental to the general welfare than would result from a system that left more victims uncompensated."<sup>163</sup>

156 See FINAL REPORT, *supra* note 130, ch. 2 at 15, stating that "under the present state of the law, negligence and strict liability in warning cases must be deemed to be functional equivalents."

157 *Id.* at 14.

158 See *Troszynski v. Commonwealth Edison Co.*, 42 Ill. App. 3d 925, 356 N.E.2d 926 (1976); *University of Pittsburgh v. Equitable Gas Co.*, 5 Pa. D. & C.3d 303 (C.P. Allegheny County 1978).

159 See Comment, *supra* note 91, at 811-15.

160 See, e.g., *Genaust v. Illinois Power Co.*, 62 Ill. 2d 456, 343 N.E.2d 465 (1976) (rejecting the notion that electrical wires are "packaging"); *Petroski v. Northern Ind. Pub. Serv. Co.*, 354 N.E.2d 736, 747 (Ind. App. 1976) (electric company's transmission and distribution lines are not part of the product sold).

161 For a discussion of policy goals of products liability doctrines, see Dickerson, *supra* note 83, at 440. See also Comment, *supra* note 91, at 816-18.

162 See Note, *supra* note 8, at 798-99; Keeton, *supra* note 153, at 402.

163 Keeton, *supra* note 153, at 402.

Consequently, a middle ground must be found between insulating utility companies from products liability and imposing upon them a standard of responsibility that would raise dramatically the cost of necessary and expensive products. Such a middle ground can best be found in restricting the operation of implied warranty and strict tort liability doctrines to direct supply injuries and to injuries caused by defective equipment on private property.

### III. Liability for Nondelivery of Utility Products

The most recent New York City blackout<sup>164</sup> graphically illustrated the extent of public dependence on utility products. Indeed, the United States Supreme Court recently characterized the continuous supply of utilities as a necessity of modern life.<sup>165</sup> Because an interruption can result in severe economic and personal injury, courts have long recognized as actionable the wrongful termination or negligent interruption of utility "services."<sup>166</sup>

Common law liability for non-delivery of utility products flows from the utility supplier's duty to render adequate service.<sup>167</sup> Because of the monopolistic nature of the utility industry and the utility customer's inability to "shop around," the duty to render adequate service originated as an implied contractual obligation.<sup>168</sup> Now frequently contained in state utility regulations,<sup>169</sup> the duty is broader in scope than the utility's obligation to individual patrons.<sup>170</sup> It has, however, been construed to include an obligation to provide a reasonably continuous supply to such patrons.<sup>171</sup> This is the aspect of the duty most relevant to a non-delivery action.<sup>172</sup>

The obligation to deliver utility products can be derived from the Code as well as from other sources. Section 2-309 recognizes as enforceable contracts that provide for successive performances for an indefinite period.<sup>173</sup> Such contracts are valid for a reasonable time, and may be terminated by either party provided reasonable notice is given prior to termination.<sup>174</sup> Utility supply con-

164 See, e.g., *Heart of Darkness*, NEWSWEEK, July 25, 1977, at 16-30.

165 *Memphis Light, Gas and Water Div. v. Craft*, 436 U.S. 1, 18 (1978). See also *Condoma v. Vermont Elec. Coop. Inc.*, 400 F. Supp. 358, 365 (D. Vt. 1965); *Artesian Water Co. v. Cynwyd Apartments, Inc.*, 297 A.2d 387, 389 (Del. 1972); *National Food Stores, Inc. v. Union Elec. Co.*, 494 S.W.2d 379, 383 (Mo. App. 1973); *Josephson v. Mountain Bell*, 576 P.2d 850, 853 (Utah 1978).

166 See generally Annot., 4 A.L.R.3d 594 (1965).

167 See Note, *The Duty of a Public Utility to Render Adequate Service: Its Scope and Enforcement*, 62 COLUM. L. REV. 312, 315 (1962).

168 See, e.g., *Curry v. Norwood Elec. Light & Power Co.*, 125 Misc. 279, 211 N.Y.S. 441 (St. Lawrence County Ct. 1925).

169 See, e.g., IND. CODE ANN. § 8-1-2-4 (Burns 1973), which provides in part: "Every public utility is required to furnish reasonably adequate service and facilities."

170 See generally Note, *supra* note 167.

171 See, e.g., *National Food Stores, Inc. v. Union Elec. Co.*, 494 S.W.2d 379, 381.

172 Adequacy of service is frequently at issue in cases brought against water suppliers for injuries caused by insufficient water pressure at hydrants. The damage is typically caused when water pressure has been insufficient to extinguish a fire. The majority of these cases have been resolved against the customer, on the grounds that individual members of the public are only incidental beneficiaries. See *Gelhaus v. Nevada Irrigation Dist.*, 43 Cal. 2d 779, 278 P.2d 689 (1955) (en banc); *Stuart v. Crestview Mutual Water Co.*, 34 Cal. App. 3d 802, 110 Cal. Rptr. 543 (1973) (expressing dissatisfaction with the rule); *Earl E. Roher Transfer & Storage, Inc. v. Hutchinson Water Co., Inc.*, 182 Kan. 546, 322 P.2d 810 (1958); *Moch Co. v. Rensselaer Water Co.*, 247 N.Y. 160, 159 N.E. 896 (1928); *Clark v. Meigs Equip. Co.*, 10 Ohio App. 2d 157, 226 N.E.2d 791 (1967). *Contra*, *Veach v. City of Phoenix*, 102 Ariz. 195, 427 P.2d 335 (1967) (en banc); *Lopez v. Arizona Water Co.*, 23 Ariz. App. 99, 530 P.2d 1132 (1975). See generally Comment, *Torts—Liability of Water Company to Individuals for Failure to Furnish Water*, 26 TEMPLE L.Q. 214 (1952).

173 U.C.C. § 2-309.

174 *Id.*

tracts contemplate successive performances and, although they are normally indefinite in duration, both parties reasonably expect the utility to supply the product as long as the customer continues to pay for it. Neither expects that the utility may refuse to deliver at will. Given the parties' expectations at the time of contracting and the consumer's dependence on a continuous source of supply, section 2-309 may be construed as obligating the utility supplier to deliver until notice of termination is given.<sup>175</sup> Since the Code provides that non-contradictory common law principles supplement Code provisions,<sup>176</sup> the obligation to deliver extrapolated from section 2-309 can be supplemented by the common law duty to render reasonably continuous service.<sup>177</sup>

The causes of nondelivery are diverse, ranging from intentional termination for nonpayment to temporary blackouts caused by "acts of God." The actionability of a failure to deliver, under both the common law and the Code, depends on the cause of the nondelivery. Liability for intentional nondelivery has generally depended on courts' perceptions of whether the utility company's conduct was justifiable under the circumstances. For example, courts have expressly upheld a utility company's right to terminate a customer's supply if the customer has failed to pay a just bill,<sup>178</sup> but not if the power of termination has been used to coerce payment of a disputed bill.<sup>179</sup>

The application of the Code to actions based on intentional nondelivery would not disturb the utility company's power to terminate for nonpayment or other breach of contract, because section 2-703 gives a seller the right to withhold delivery or cancel the contract when the buyer is in breach.<sup>180</sup> Instead, the Code would have its chief impact on cases in which the failure to deliver was unintentional. While application of the Code would not enhance the standard of liability for utility suppliers in these unintentional nondelivery cases, it would shift the burden of proof and thereby facilitate recovery by consumers.

### A. Recovery Under Common Law Theories

Although a customer injured by nondelivery may sue his supplier for either negligence or breach of contract,<sup>181</sup> most cases have been brought on a negligence theory. Contract principles have been used only in cases in which an express contract is alleged<sup>182</sup> or in which the customer made his supplier

175 Excuse from performance is discussed at notes 207-27 *infra* and accompanying text.

176 U.C.C. § 1-103 provides in part: "Unless displaced by the particular provisions of this Act, the principles of law and equity, . . . shall supplement its provisions."

177 See notes 167-71 *supra* and accompanying text.

178 See, e.g., *Siegel v. Minneapolis Gas Co.*, 271 Minn. 127, 135 N.W.2d 60 (1965).

179 See, e.g., *Water Supply Bd. of the City of Arab v. Williams*, 53 Ala. App. 560, 302 So. 2d 534 (1974); *Lapham v. Town of Haines*, 372 P.2d 376 (Alaska 1962); *Utilities Operating Co. v. Pringle*, 177 So. 2d 684 (Fla. App. 1965); *Trigg v. Middle Tenn. Elec. Membership Corp.*, 533 S.W.2d 730 (Tenn. App. 1975).

180 U.C.C. § 2-703(a), (f).

181 See, e.g., *Humphreys v. Central Ky. Natural Gas Co.*, 190 Ky. 733, 743, 229 S.W. 117, 121 (1920); *Lund v. Village of Princeton*, 250 Minn. 472, 482, 85 N.W.2d 197, 204 (1957). See generally Annot., 4 A.L.R.3d 594 (1965).

182 See, e.g., *Coal Dist. Power Co. v. Katy Coal Co.*, 141 Ark. 337, 217 S.W. 449 (1920); *Florida Power Corp. v. City of Tallahassee*, 154 Fla. 638, 18 So. 2d 671 (1944); *Hippard Coal Co. v. Illinois Power & Light Corp.*, 317 Ill. App. 47, 45 N.E.2d 701 (1942).

aware of specific needs.<sup>183</sup> This preference for tort principles may reflect the more limited damages available in contract actions. Damages to customers resulting from utility outages are usually consequential in nature.<sup>184</sup> Because many courts follow a restrictive approach to the recovery of consequential damages in contract actions and require the injured party to have communicated his special circumstances at the time of contracting,<sup>185</sup> it is not surprising that injured customers have preferred the more flexible tort remedies.<sup>186</sup>

183 See, e.g., *Arkansas Power & Light v. Abboud Co.*, 204 Ark. 808, 164 S.W.2d 1000 (1942); *Langley v. Pacific Gas & Elec. Co.*, 41 Cal. 2d 655, 262 P.2d 846 (1953) (en banc); *Humphreys v. Central Ky. Natural Gas Co.*, 190 Ky. 733, 229 S.W. 117; *Lund v. Village of Princeton*, 250 Minn. 472, 85 N.W.2d 197; *Hiers v. South Carolina Power Co.*, 198 S.C. 280, 17 S.E.2d 698 (1941). *But cf. Curry v. Norwood Elec. Power & Light Co.*, 125 Misc. 279, 211 N.Y.S. 441 (St. Lawrence County Ct. 1925) (contract theory used but no mention of whether an express contract existed or whether defendant had any knowledge of plaintiff's needs).

184 *But see Florida Power Corp. v. City of Tallahassee*, 154 Fla. 638, 18 So. 2d 671, in which the issue was recovery of liquidated damages pursuant to utility supply contract between power company and city.

185 See *Hadley v. Baxendale*, 156 Eng. Rep. 145 (Ex. 1954). For a discussion of the two interpretations of the *Hadley* rule, see 5 A. CORBIN, CORBIN ON CONTRACTS §§ 1008-12 (1964); 11 S. WILLISTON, WILLISTON ON CONTRACTS § 1357 (3d ed. 1968).

186 See, e.g., the court's comment in *Humphreys v. Central Ky. Natural Gas Co.*, 190 Ky. 733, 229 S.W. 117 (1920): "If a case should come up in which the damages were not susceptible of reasonable estimation . . . an action for tort might be brought." *Id.* at 743, 229 S.W. at 121.

Damages for non-delivery under the U.C.C., however, would be almost as flexible as a tort remedy for the utility customer. Damages may be sought under U.C.C. § 2-711(1)(b), which authorizes a buyer to seek damages pursuant to U.C.C. § 2-713 when the seller has failed to deliver. Under the compensatory damages formula for non-delivery in U.C.C. § 2-713(1), the measure of damages is the difference between the market price of the goods at the time when the buyer learned of the breach and the contract price, together with incidental and consequential damages, but less any expenses saved in consequence of the breach. Compensatory damages for a customer injured by non-delivery will be negligible. The difference between the market price and contract price, a fraction of the monthly rate, would be cancelled by the "less any expenses saved" phrase. The important remedy for non-delivery, therefore, will be consequential damages.

The Code places two preconditions on the recovery of consequential damages. A buyer injured by non-delivery may recover damages for "any loss" if he can prove (1) that the loss could not have been prevented by cover, and (2) that at the time of contracting the seller had reason to know of the general or specific requirements of the buyer. See U.C.C. § 2-715(2)(a). The mitigation element would be easily met by a utility customer, as he would ordinarily have no means of procuring substitute service. The second precondition is a more flexible version of the *Hadley v. Baxendale* rule. See WHITE & SUMMERS, *supra* note 23, § 10-4, at 314-21. Although some courts have construed *Hadley* to require that the seller have had actual knowledge of the buyer's special circumstances and consciously assumed the risk at the time the contract was made, the Code drafters opted for a foreseeability test. See U.C.C. § 2-715, Official Comments 2 and 3. See also Gerwin v. Southeastern Cal. Ass'n of Seventh Day Adventists, 14 Cal. App. 3d 209, 221, 92 Cal. Rptr. 111, 118 (1971).

The availability of consequential damages for utility customers depends on how specifically the foreseeability requirement is framed. Comment 3 to U.C.C. § 2-715 provides that:

[T]he seller is liable for consequential damages in all cases where he had reason to know of the buyer's general or particular requirements at the time of contracting. It is not necessary that there be a conscious acceptance of an insurer's liability on the seller's part, nor is his obligation for consequential damages limited to cases in which he fails to use due effort in good faith.

*Particular needs of the buyer must generally be made known to the seller while general needs must rarely be made known to charge the seller with knowledge* (emphasis added).

When a homeowner contracts for gas, electricity or water, it seems reasonable to expect that the supplier is put on notice that the utility product is intended for normal household use. For example, if an interruption in the supply of electricity causes refrigerated food to spoil, such a consequential loss would be foreseeable. On the other hand, a dialysis machine that must be in continuous operation would not be reasonably foreseeable, and a court would likely require some affirmative notice of it to the utility supplier if the supplier is to be held liable for consequential damages. Thus, the requirement of foreseeability can be applied in sliding scale fashion. When the loss results from an ordinary, general need, the test for foreseeability moves toward greater objectivity; when the loss results from an unusual, particularized need, the test for foreseeability moves toward greater subjectivity.

Any loss that can be proven and is not too speculative may be the subject of consequential damages under the Code. See, e.g., *Argus Indus., Inc. v. Liodas*, 443 F.2d 1255 (9th Cir. 1971) (damages flowing from buyer's bankruptcy); *Frank R. Jellef, Inc. v. Pollak Bros., Inc.*, 171 F. Supp. 467 (D. Ind. 1957) (attorney's fees); *Martel v. Duffy-Mott Corp.*, 15 Mich. App. 67, 166 N.W.2d 541 (1968) (loss of enjoyment of a can of applesauce). *But see Chrysler Corp. v. E. Shavitz & Sons*, 536 F.2d 743 (7th Cir. 1976) (lost profits



A utility company's duty to maintain a continuous supply of its product is not absolute under either contract or negligence principles.<sup>187</sup> Unless an absolute duty has been undertaken by express contract,<sup>188</sup> the supplier need only meet a standard of reasonable care.<sup>189</sup> There is no strict liability for utility outages since a utility company is not an insurer of constant service.<sup>190</sup>

Under both tort and contract law, a utility supplier is not responsible for non-delivery caused by either an "act of God" or another force beyond the supplier's control.<sup>191</sup> For an act of God to exculpate the supplier, however, the occurrence must have been unforeseeable and the damage must not have been avoidable by the exercise of reasonable care.<sup>192</sup> If a supplier's negligent act has combined with an act of God to cause the injury, the act of God does not excuse the supplier from liability.<sup>193</sup>

In *Ellyson v. Missouri Power & Light Co.*,<sup>194</sup> the plaintiff operators of a hatchery required a constant flow of electricity to operate incubators. The defendant power company had promised plaintiffs that it would maintain an alternative source of current, but failed to do so. During a winter ice storm a five-hour blackout occurred, and plaintiffs lost \$750 worth of egg hatchings. The jury held for the plaintiffs, despite the electrical company's claim that the storm was an act of God. The Missouri Court of Appeals affirmed, holding that the jury had been properly instructed to find for the plaintiff if the defendant's negligence had combined with the storm to bring about the plaintiffs' injuries.<sup>195</sup>

Proving that a utility company's negligence was combined with an event beyond its control requires access to technical information in the utility company's possession. The allocation of the burden of proving excuse or lack of excuse is therefore an important issue for the utility consumer. Because proof of

too speculative); *Murray v. Holiday Rambler, Inc.*, 83 Wis. 2d 406, 265 N.W.2d 513, 526-27 (1978) (attorney's fees not recoverable as consequential damages under Code).

While U.C.C. § 2-715(2)(b) specifically allows damages for personal injury or property damage proximately resulting from *breach of warranty*, recovery of consequential personal injury and property damage would presumably be permitted in non-warranty cases, so long as the foreseeability and mitigation requirements of U.C.C. § 2-715(2)(a) are satisfied. Professors White and Summers distinguish the recovery of consequential damages in non-warranty cases from warranty cases by noting that there is no foreseeability requirement for the latter. See WHITE & SUMMERS, *supra* note 23, at 324. However, it would seem that the foreseeability of the buyer's use of the goods in question will be relevant to the question of whether injuries were *proximately* caused by a breach of warranty.

187 See, e.g., *Rossin v. Southern Union Gas Co.*, 472 F.2d 707 (10th Cir. 1973); *Bromer v. Florida Power & Light Co.*, 45 So. 2d 658 (Fla. 1950) (en banc) (on rehearing); *Devers v. Long Island Lighting Co.*, 79 Misc. 2d 165, 359 N.Y.S.2d 940 (Sup. Ct. 1974) (per curiam).

188 *Coal Dist. Power Co. v. Katy Coal Co.*, 141 Ark. 337, 217 S.W. 449 (1919).

189 See, e.g., *Senderoff v. Housatonic Pub. Serv. Co.*, 147 Conn. 18, 156 A.2d 517 (1959); *Milford Canning Co. v. Central Ill. Pub. Serv. Co.*, 39 Ill. App. 2d 258, 188 N.E.2d 397 (1963).

190 See, e.g., *Langley v. Pacific Gas & Elec. Co.*, 41 Cal. 2d 655, 660, 262 P.2d 846, 849 (1953) (en banc); *National Food Stores, Inc. v. Union Elec. Co.*, 494 S.W.2d 379, 381 (Mo. App. 1973); *Henneke v. Gasconade Power Co.*, 236 Mo. App. 100, 112, 152 S.W.2d 667, 673 (1941).

191 See, e.g., *Florida Power Corp. v. City of Tallahassee*, 154 Fla. 638, 18 So. 2d 671 (1944); *Homes v. Monongahela Power Co.*, 136 W. Va. 877, 69 S.E.2d 131 (1952); *Dana v. Con Edison Co.*, 71 Misc. 2d 1029, 337 N.Y.S.2d 722 (Civ. Ct. 1972).

192 See *Florida Power Corp. v. City of Tallahassee*, 154 Fla. 638, 646, 18 So. 2d 671, 675 (1944). See also A. CORBIN, CORBIN ON CONTRACTS §§ 1324, 1329 (One Volume Edition 1952).

193 See, e.g., *Arkansas Power & Light v. Abboud*, 204 Ark. 808, 164 S.W.2d 1000 (1942); *Ellyson v. Missouri Power & Light Co.*, 59 S.W.2d 714 (Mo. App. 1933) (per curiam); *Lee v. Consolidated Edison Co.*, 95 Misc. 2d 120, 126-27, 407 N.Y.S.2d 777, 782 (Civ. Ct. N.Y. 1978), *rev'd on other grounds*, 98 Misc. 2d 304, 413 N.Y.S.2d 826 (Sup. Ct. 1978) (per curiam).

194 59 S.W.2d 714 (Mo. App. 1933).

195 *Id.* at 718-19.

the defendant's failure to use reasonable care is essential to any negligence case, several courts have indicated that the plaintiff in a nondelivery suit should bear the burden of proving that his injuries were not caused solely by an act of God.<sup>196</sup> In other words, plaintiff must prove that storms, lightning and the like were not the proximate cause of his injury.<sup>197</sup>

In a nondelivery suit based on breach of contract, the supplier's excuse would be cast in terms of impossibility of performance caused by an act of God.<sup>198</sup> However, an act of God will not excuse the supplier if the event was foreseeable and if the supplier could have avoided its harmful effects by exercising reasonable diligence.<sup>199</sup> Under contract law, the party seeking to excuse his nonperformance bears the burden of proving that excuse. As one authority states:

Undoubtedly a promisor who is asserting his discharge must allege and prove the frustrating event and that after occurrence of the event, it was impossible to render the promised performance or to attain the purpose for which the contract was made.<sup>200</sup>

Despite this well-accepted principle, several courts in nondelivery cases brought on contract theories have stated that when an act of God is alleged to have caused the nondelivery, the plaintiff bears the burden of proving that the utility company acted negligently.<sup>201</sup>

<sup>196</sup> Cf. *Monolith Portland Midwest Co. v. Western Pub. Serv. Co.*, 142 F.2d 857 (10th Cir. 1944) (plaintiff must prove defendant's negligence caused the power failure); *Senderoff v. Housatonic Pub. Serv. Co.*, 147 Conn. 18, 156 A.2d 517 (1959) (plaintiff must prove defendant's negligence caused the power failure). *But see Danna v. Con Edison Co.*, 71 Misc. 2d 1029, 1031-32, 337 N.Y.S.2d 722, 725 (Civ. Ct. 1972) (defendant utility company must prove that its "brownout" was caused by an act of God).

<sup>197</sup> The doctrine of *res ipsa loquitur* has been used to force the defendant to come forward with evidence exculpating itself for the non-delivery. In two of these cases, *Henneke v. Gasconade Power Co.*, 236 Mo. App. 100, 152 S.W.2d 667 (1941) and *Bearden v. Lyntegar Elec. Coop.*, 454 S.W.2d 885 (Tex. Civ. App. 1970), plaintiffs were allowed to use the doctrine after having eliminated occurrences beyond the defendant's control as possible causes. In two trial court cases arising out of the 1977 New York City blackout, however, plaintiffs were allowed to use *res ipsa loquitur* despite the fact that a lightning strike had been the initial cause of the outage. *See Lee v. Consolidated Edison Co. of N.Y.*, 95 Misc. 2d 120, 407 N.Y.S.2d 777 (Civ. Ct.), *rev'd on other grounds*, 98 Misc. 2d 304, 413 N.Y.S.2d 826 (Sup. Ct. 1978) (*per curiam*); *Shankman v. Consolidated Edison Co.*, 94 Misc. 2d 150, 404 N.Y.S.2d 787 (Civ. Ct.), *appeal dismissed*, 99 Misc. 2d 956, 420 N.Y.S.2d 960 (Sup. Ct. 1979). The trial judge in *Shankman* commented:

There are theoretically many causes for the blackout which brought New York City to a standstill the night of July 13, 1977. The possible causes which point to defendant's negligence are so probable, in view of the circumstances, and those which exonerate the defendant are so improbable, that it is unnecessary for a plaintiff to illustrate how the event occurred.

94 Misc. 2d at 151, 407 N.Y.S.2d at 788.

The continued viability of *res ipsa loquitur* in such situations is questionable, particularly in New York. Both *Shankman* and *Lee* had held that an exculpatory clause contained in Consolidated Edison's tariff filed with the Public Service Commission was void as against public policy. *Lee* was subsequently reversed on appeal on the ground that the exculpatory clause was *not* against public policy. The court stated that, because the exculpatory clause was valid, it had no occasion to consider whether the application of *res ipsa loquitur* was proper. 98 Misc. 2d at 306, 413 N.Y.S.2d at 828. A subsequent appeal in the *Shankman* case was dismissed, but the court noted that "were the appeal properly before us, we would be inclined to reverse." 99 Misc. 2d at 957, 420 N.Y.S.2d at 960. *Accord*, *Lo Vico v. Consolidated Edison Co.*, 99 Misc. 2d 897, 420 N.Y.S.2d 825 (Sup. Ct. 1979) (upholding exculpatory clause); *Devers v. Long Island Lighting Co.*, 79 Misc. 2d 165, 359 N.Y.S.2d 940 (Sup. Ct. 1974); *Newman v. Consolidated Edison Co.*, 79 Misc. 2d 153, 360 N.Y.S.2d 141 (Sup. Ct. 1973) (upholding exculpatory clause). For further discussion of the enforceability of exculpatory clauses in utility tariffs, see note 221 *infra*.

<sup>198</sup> *See, e.g.*, *Florida Power Corp. v. City of Tallahassee*, 154 Fla. 638, 18 So. 2d 671 (1944).

<sup>199</sup> *See* 6 A. CORBIN, CORBIN ON CONTRACTS § 1329 (1962).

<sup>200</sup> *Id.* at 350.

<sup>201</sup> *See Bromer v. Florida Power & Light Co.*, 45 So. 2d 658 (Fla. 1950) (en banc) (on rehearing); *Lund*

In *Bromer v. Florida Power & Light Co.*,<sup>202</sup> for example, plaintiffs sued their electrical supplier when plaintiffs' meat spoiled as a result of defendant's failure to supply sufficient voltage to operate plaintiffs' cooling equipment.<sup>203</sup> After deciding that an implied contract to furnish electricity only obligates the utility company to use reasonable care,<sup>204</sup> the Supreme Court of Florida held that the customer bears the burden of proving negligence on the part of the supplier in an action based on implied contract.<sup>205</sup> According to the court, "loose practice" would be encouraged unless a greater burden is placed on a person relying on an implied as opposed to an express contract.<sup>206</sup> This rationale, however, is only relevant in determining whether a utility company should be subject to absolute liability. It is not relevant in deciding whether the supplier should be liable if it cannot prove that it acted with reasonable diligence.

To summarize, in the absence of an express contractual provision obligating the utility company to provide a certain amount of a particular utility product, a customer bringing a common law action for nondelivery will not likely recover unless he can prove that the utility company was negligent.

### B. Recovery for Nondelivery Under the Code

There has been no reported case in which a nondelivery action has been tried under the Code. The following discussion assumes that the Code applies, and examines the logical application of the Code's provisions to nondelivery cases.

As under the common law, a utility company is not an insurer of constant supply under the Code in the sense that it is liable for nondelivery regardless of surrounding circumstances. A seller's duty to deliver under the Code is contractual, however, and as such it is absolute unless the seller can prove that his performance was excused.<sup>207</sup> Unless a utility company has expressly undertaken a greater responsibility, it can seek excuse under section 2-615 if nondelivery is caused by an event beyond its control.<sup>208</sup>

v. Village of Princeton, 250 Minn. 472, 481-82, 85 N.W.2d 197, 204 (1957) (*dictum*). See also *Monolith Portland Midwest Co. v. Western Pub. Serv. Co.*, 142 F.2d 857 (10th Cir. 1944) (holding that plaintiff had burden of proving negligence on part of utility supplier in a nondelivery action pursuant to express requirements contract, since plaintiff had pleaded negligence and since contract exempted defendant for occurrences beyond its control). See notes 226-27 *infra* and accompanying text for a discussion of the treatment of such clauses under U.C.C. § 2-615. But see *Danna v. Con Edison Co.*, 71 Misc. 2d 1029, 1031, 337 N.Y.S.2d 722, 725 (Civ. Ct. 1972) (utility supplier under implied contract bears burden of proving that an act of God made performance impossible).

202 45 So. 2d 658 (Fla. 1950) (en banc) (on rehearing).

203 The supply of insufficient voltage could be treated as a breach of warranty as well as a nondelivery. See notes 73-96 *supra* and accompanying text.

204 *Bromer v. Florida Power & Light Co.*, 45 So. 2d at 660.

205 *Id.* at 661.

206 *Id.* at 660.

207 See notes 209-27 *infra* and accompanying text.

208 U.C.C. § 2-615 provides in part:

Except so far as a seller may have assumed a greater obligation . . . :

- (a) Delay in delivery or non-delivery in whole or in part by a seller . . . is not a breach of his duty under a contract for sale if performance as agreed has been made impracticable by the occurrence of a contingency the non-occurrence of which was a basic assumption on which the contract was made . . .

Section 2-615, one of three Code provisions excusing nonperformance,<sup>209</sup> "was intended to serve as a hodgepodge for the common law doctrines of frustration and impossibility."<sup>210</sup> Although section 2-615 provides a more flexible basis for excuse than its analogies in the common law,<sup>211</sup> the concept underlying excuse under both the common law and the Code is that an event beyond the control of the promisor makes performance "so vitally different that the contract cannot reasonably be thought to govern."<sup>212</sup>

Section 2-615 excuses delay or nondelivery if performance under the contract is impracticable<sup>213</sup> due to a contingency which the parties, at the time of contracting, assumed would not occur.<sup>214</sup> According to one author, excuse under section 2-615 requires affirmative answers to the following three questions:

- (1) Has a *contingency* occurred?
- (2) Was its non-occurrence a *basic assumption* upon which the contract was made?
- (3) Has the contingency rendered the agreed performance *impracticable*?<sup>215</sup>

The usual cause for a blackout would be the occurrence of some adverse weather condition. Asking whether the nonoccurrence of such a contingency was a basic assumption upon which the contract was made is the same as asking whether the contingency was foreseen by the parties.<sup>216</sup> Parties to a utility supply contract reasonably expect ice to accumulate in winter and thunderstorms to occur in spring, but neither party can foresee the timing or intensity of such conditions. Since the parties likely assume that weather will be "normal," the

<sup>209</sup> The Code's excuse provisions are found in §§ 2-613, 2-614 and 2-615. Whereas U.C.C. § 2-615 excuses nonperformance when an unforeseen contingency renders performance impracticable, U.C.C. § 2-613 provides excuse when goods identified at the time the contract is made suffer casualty without the fault of either party before risk of loss has passed to the buyer. *See generally* Colley v. Bi-State, Inc., 21 Wash. App. 772, 586 P.2d 908 (1978). It is unlikely that a utility supplier would seek excuse under U.C.C. § 2-613, since utility supply contracts do not require that any specific goods be identified at the time the contract is made. Furthermore, an official comment to U.C.C. § 2-615 provides:

Where a particular source of supply is exclusive under the agreement and fails through casualty, the present section applies rather than the provision on destruction or deterioration of specific goods. The same holds true where a particular source of supply is shown by the circumstances to have been contemplated or assumed by the parties at the time of contracting . . . .

U.C.C. § 2-615, Official Comment 5.

However, to the extent that both U.C.C. §§ 2-613 and 2-615 embody a prerequisite of non-fault on the part of the seller, the analysis of this section of the article would be unchanged. *See generally* Wallach, *The Excuse Defense in the Law of Contracts: Judicial Frustration of the U.C.C. Attempt to Liberalize the Law of Commercial Impracticability*, 55 NOTRE DAME LAW. 203 (1979).

<sup>210</sup> Comment, *Uniform Commercial Code Section 2-615: Commercial Impracticability from the Buyer's Perspective*, 51 TEMPLE L.Q. 518, 533 (1978).

<sup>211</sup> *See generally* Comment, *Contractual Flexibility in a Volatile Economy: Saving U.C.C. Section 2-615 from the Common Law*, 72 NW. U.L. REV. 1032 (1978). For a discussion of the common law doctrines of frustration and impossibility, see Page, *The Development of the Doctrine of Impossibility of Performance*, 18 MICH. L. REV. 589 (1920); Comment, *supra* note 210, at 518-37.

<sup>212</sup> *Eastern Airlines, Inc. v. McDonnell Douglas Corp.*, 532 F.2d 957, 991 (5th Cir. 1976); 6 S. WILLISTON, CONTRACTS § 1963, at 5511 (rev. ed. 1938). *See also* Robberson Stell, Inc. v. J.D. Abrams, Inc., 582 S.W.2d 558, 562-64 (Tex. Civ. App. 1979).

<sup>213</sup> For a discussion of the development of standards for determining whether performance has been rendered impracticable, see Comment, *Contractual Excuse Based On a Failure of Presupposed Conditions*, 14 DUQ. L. REV. 235, 251-53 (1976).

<sup>214</sup> U.C.C. § 2-615(a).

<sup>215</sup> Comment, *supra* note 213, at 238-39.

<sup>216</sup> *See* note 222 *infra*.

nonoccurrence of abnormal weather conditions may be considered a basic assumption upon which the contract is made.

A further requirement, not stated in the text of section 2-615 but appearing in the official comments to the section and in case law, is that the defense of commercial impracticability is unavailable to a seller whose contributory fault has helped to bring about impracticability of performance.<sup>217</sup> Although comment 5 states that section 2-615 is a vehicle for excuse when an exclusive source of supply fails, it also states that "[t]here is no excuse under this section, however, unless the seller has employed all due measures to assure himself that his source will not fail."<sup>218</sup> The seller must thus act in a commercially reasonable manner to avert a contingency as well as the harmful effects of a contingency.<sup>219</sup>

Although a utility supplier cannot prevent unusual weather conditions, it may lose its section 2-615 defense if it fails to take reasonable actions to prevent or mitigate the effects of weather conditions. For example, there is evidence that the 1977 New York City blackout could have been averted by faster load shedding by the systems operator and that weather conditions were abetted by other human and systems errors.<sup>220</sup> While utility suppliers have generally been protected from liability in these cases through exculpatory clauses,<sup>221</sup> the New

217 See Comment, *supra* note 213, at 244-48; Wallach, *supra* note 209, at 211-12.

218 U.C.C. § 2-615, Official Comment 5.

219 See, e.g., *Luria Bros. & Co. v. Piolet Bros. Scrap Iron & Metal, Inc.*, 600 F.2d 103, 112 (7th Cir. 1979); *Chemetron Corp. v. McLouth Steel Corp.*, 381 F. Supp. 245, 257 (N.D. Ill. 1974), *aff'd*, 522 F.2d 469 (7th Cir. 1975). See also Comment, *supra* note 213, at 245-48.

220 See STATE OF NEW YORK INVESTIGATION OF THE NEW YORK CITY BLACKOUT JULY 13, 1977 (Jan. 1978), at 28-61; *The Wall Street Journal*, Aug. 25, 1977, at 14, col. 1.

221 A clause contained in the utility company's tariff, filed with and approved by the New York Public Service Commission, provided in part:

The Company will endeavor at all times to provide a regular and uninterrupted supply of service, but in case the supply of service shall be interrupted or irregular or defective or fail from causes beyond its control or through ordinary negligence of employees, servants or agents the company will not be liable therefor! (PSC No. 8, Sixth Revised Leaf No. 19, eff. June 17, 1977), cited in *Lee v. Consolidated Edison Co. of N.Y.*, 95 Misc. 2d 120, 124, 407 N.Y.S.2d 777, 780 (Civ. Ct. 1978), *rev'd*, 98 Misc. 2d 304, 413 N.Y.S.2d 826 (Sup. Ct. 1978).

The clause has been enforced by the majority of New York courts that have considered it. See *Lo Vico v. Consolidated Edison Co.*, 99 Misc. 2d 897, 420 N.Y.S.2d 825 (Sup. Ct. 1979) (per curiam); *Lee v. Consolidated Edison Co. of N.Y.*, 98 Misc. 2d 304, 413 N.Y.S.2d 826 (Sup. Ct. 1978) (per curiam); *Devers v. Long Island Lighting Co.*, 79 Misc. 2d 165, 359 N.Y.S.2d 940 (Sup. Ct. 1974); *Newman v. Consolidated Edison Co. of N.Y., Inc.*, 79 Misc. 2d 153, 360 N.Y.S.2d 141 (Sup. Ct. 1973). See also *Hamilton Employment Serv., Inc. v. New York Tel. Co.*, 253 N.Y. 468, 171 N.E. 710 (1930). *Contra*, *Shankman v. Consolidated Edison Co.*, 94 Misc. 2d 150, 404 N.Y.S.2d 787 (Civ. Ct. 1978) (refusing to enforce exculpatory clause), *appeal dismissed*, 101 Misc. 2d 281, 420 N.Y.S.2d 960 (Sup. Ct. 1979) (noting that if defendant's appeal were properly before court, court would be inclined to reverse); *Danna v. Con Edison, Co.*, 71 Misc. 2d 1029, 337 N.Y.S.2d 722 (Civ. Ct. 1972) (refusing to enforce exculpatory clause).

However, several courts in other jurisdictions have refused to enforce clauses that exculpate a utility company from liability for ordinary negligence. See, e.g., *Southwestern Pub. Serv. Co. v. Artesia Alfalfa Growers' Ass'n*, 67 N.M. 108, 353 P.2d 62 (1960); *Oklahoma Natural Gas Co. v. Appel*, 266 P.2d 442 (Okla. 1953). Such clauses have been denied enforcement on two theories: (1) that the Public Service Commission has no right to adjudicate purely private matters, or (2) that public policy prevents a unilateral exemption from liability by one in a position of superior bargaining power.

Application of the Code would lend an additional ground for refusing enforcement of such clauses, namely, that such clauses are unconscionable under U.C.C. § 2-302. The purpose of the Code's unconscionability provision is "the prevention of oppression and unfair surprise." U.C.C. § 2-302, Official Comment 1. Thus, the fact that many exculpatory clauses are contained in tariffs or schedules filed with the Public Service Commission and never seen by the customer is highly relevant to the unconscionability inquiry. Such clauses may be objectionable not only because they are unilaterally imposed and unbargained for, but also because they are concealed. For detailed discussion of the developing interpretations of the concept of unconscionability, see WHITE & SUMMERS, *supra* note 23, at 112-30; Leff, *Unconscionability and the Code: The Emperor's New Clause*, 115 U. PA. L. REV. 485 (1967); SPANOGLE, *Analyzing Unconscionability Problems*, 117 U. PA. L. REV. 931 (1969); Note, *Contracts—Developing Concepts of Unconscionability*, 80 W. VA. L. REV. 87 (1977).

York blackout provides an excellent illustration of a combination of a supplier error and an uncontrollable contingency.

As applied to utility supply contracts, section 2-615 does not differ substantively from the common law "act of God" excuse. Both the common law and the Code would require that timely delivery of the utility product be prevented by a contingency beyond the control of the supplier, and that the supplier's fault not contribute to the harmful effects of the contingency. There has been much confusion over whether section 2-615 requires a subjectively unforeseen contingency rather than an objectively unforeseeable contingency.<sup>222</sup> However, to the extent that the section bars excuse for the seller's contributory fault, the foreseeability issue would enter under the guise of determining fault. A utility company would not be expected to act with perfect foresight, but only to take commercially reasonable measures to insure that its source does not fail.<sup>223</sup>

Thus, a utility company could escape liability for nondelivery under a Code excuse that is, in the utility context, virtually identical to the common law "act of God" defense. The remaining question is: Who bears the burden of proving contributory fault or its absence? Must the customer injured by nondelivery prove that the utility company failed to act in a commercially reasonable manner and that its failure to use due care contributed to the harmful effects of a contingency? Or must the utility supplier prove that it acted in a commercially reasonable manner to avert the harmful effects of an unforeseen contingency?

Most common law cases dealing with the burden of proof issue place the onus on the utility customer, even if the action is tried on a contract theory.<sup>224</sup> Although there is no reported case in which the nondelivery of a utility product has been tried on a Code theory, the case law under section 2-615 and common law impossibility makes clear that the burden of proof is on the promisor seeking excuse from performance.<sup>225</sup> This is true even though the contract contains

Furthermore, any disclaimer of warranty would have to meet the requirements of U.C.C. § 2-316 to be enforceable. While limitations on remedies are specifically permitted by U.C.C. § 2-719, such limitations are valid only if not unconscionable. Limitation of consequential damages is *prima facie* unconscionable where personal injury is caused by consumer goods. U.C.C. § 2-719. See Tracy, *Disclaiming and Limiting Liability for Commercial Damages*, 83 COM. L.J. 8, 12-15, 19 (1978); Note, *Legal Control on Warranty Liability Limitation Under the Uniform Commercial Code*, 63 VA. L. REV. 791 (1977); Note, *Fairness, Flexibility, and the Waiver of Remedial Rights by Contract*, 87 YALE L.J. 1057 (1978).

<sup>222</sup> Compare, *Eastern Airlines v. McDonnell Douglas Corp.*, 532 F.2d 957 (5th Cir. 1976) and *Robberson Stell, Inc. v. J.D. Abrams, Inc.*, 582 S.W.2d 558 (Tex. Civ. App. 1979) with *Neal-Cooper Grain Co. v. Texas Gulf Sulphur Co.*, 508 F.2d 283 (7th Cir. 1974) and *Transatlantic Fin. Corp. v. United States*, 363 F.2d 312 (D.C. Cir. 1966). See also Comment, *supra* note 211, at 1038-49; Comment, *supra* note 213, at 247-51.

<sup>223</sup> See Comment, *supra* note 213, at 246.

<sup>224</sup> See notes 196-97, *supra* and accompanying text.

<sup>225</sup> See *Eastern Airlines v. McDonnell Douglas Corp.*, 532 F.2d at 990 n.92; *Ocean Air Tradeways, Inc. v. Arkay Realty Corp.*, 480 F.2d 1112, 1117 (9th Cir. 1973); *Abrams v. Motter*, 3 Cal. App. 3d 828, 840, 83 Cal. Rptr. 855, 862 (1970); *Great Am. Ins. Co. v. City of Boulder*, 476 P.2d 586, 587 (Colo. App. 1970); *Sechrest v. Forest Furniture Co.*, 264 N.C. 216, 141 S.E.2d 292 (1965); *Blount-Midyette v. Aeroglide Corp.*, 254 N.C. 484, 119 S.E.2d 225 (1961); *Rich. v. McMullan*, 506 S.W.2d 745, 748 (Tex. Civ. App. 1974). See also 3A A. CORBIN, CORBIN ON CONTRACTS § 1978B, at 272-74 (1978); Wallach, *supra* note 209, at 211.

a *force majeure*<sup>226</sup> or "excusable delay" clause.<sup>227</sup>

The primary effect of application of the Code to utility supply contracts in nondelivery cases would be to allocate the risk of nonpersuasion on the issue of due care to the utility company.<sup>228</sup> The fact that the utility supplier is the true repository of knowledge and technical expertise in such cases justifies such a result.<sup>229</sup> Another consideration supporting this result is the high degree of customer dependency which characterizes the relationship between utility suppliers and their customers. By applying the contract law principle that a promisor bears the burden of proving excuse, the courts would encourage utility companies to exercise greater care in carrying out their duty to provide customers with a reasonably continuous supply of utility products. As one commentator has observed:

[T]he evidence of causation is much more readily available to [the utility company] than to the customer, and the company would be more conversant with the operations and facilities of its system. It would also seem consistent with the high degree of care required of the public utilities to place upon the power company the burden of justifying its nonexecution of that duty.<sup>230</sup>

#### IV. Conclusion

Wholesale application of the Code to utility supply contracts would effect several significant changes in the legal responsibilities of public utilities. Applying Code warranty provisions (and other product liability doctrines) would create strict liability for injuries caused by direct sales of defective utility prod-

226 "A typical *force majeure* clause provides that a party for whose benefit the clause was inserted will be excused from performing a particular act where his failure to perform is due to certain causes or events beyond his reasonable control." Comment, *supra* note 210, at 524 n.21. See generally Squillante and Congalton, *Force Majeure*, 80 Com. L.J. 4 (1975).

227 See *Eastern Air Lines, Inc. v. McDonnell Douglas Corp.*, 532 F.2d at 990 n.92. See also 3A A. CORBIN, CORBIN ON CONTRACTS § 642, at 73 (1960); Squillante and Congalton, *supra* note 226, at 7. But see *Monolith Portland Midwest Co. v. Western Pub. Serv. Co.*, 142 F.2d 857 (10th Cir. 1944). In addition, exemption clauses are limited by Code sections prohibiting agreements that are manifestly unreasonable, unconscionable, or proposed in bad faith. See *Eastern Air Lines, Inc. v. McDonnell Douglas Corp.*, 532 F.2d at 991 n.96. See also the discussion at note 221 *supra*.

228 One other potential change in a utility company's liability for non-delivery concerns the obligation to give advance notice of planned or other purposeful interruptions. A utility company has traditionally had no duty to give customers advance notice of deliberate temporary interruptions unless the customer's particular needs were known and the giving of notice was practicable under the circumstances. See *Langley v. Pacific Gas & Elec. Co.*, 41 Cal. 2d 655, 262 P.2d 846 (1953) (en banc); *Brame v. Light, Heat & Water Co.*, 95 Miss. 26, 48 So. 728 (1909). See also *Greene v. Georgia Power Co.*, 132 Ga. App. 53, 207 S.E.2d 594 (1974). Two more recent cases have allowed recovery to customers whose property damage could have been averted had they had advance notice of interruptions. These decisions were based on a foreseeability test. See *National Food Stores, Inc. v. Union Elec. Co.*, 494 S.W.2d 379 (Mo. App. 1973); *Cramer v. Niagara Mohawk Power Corp.*, 45 Misc. 2d 670, 257 N.Y.S.2d 380 (Albany County Ct. 1965). See generally Comment, *Liability of Public Utility for Temporary Interruption of Service*, 74 WASH. U.L.Q. 344 (1974).

An application of the Code could be used to reinforce the trend evidenced by the two latter cases, albeit on a different doctrinal base. Under the Code, a supplier could still be excused from performance if the interruption was necessitated by some emergency. However, U.C.C. § 2-615(c) provides that where the seller claims excuse for such a reason, he must "notify the buyer *seasonably* that there will be delay or non-delivery. . . ." (emphasis added). Only notice that is given prior to the interruption would give the customer the opportunity to avert harm. Since advance notice is the only type of notice meaningful under the circumstances, it is arguable that the reasonable notice requirement of U.C.C. § 2-615(c) would obligate suppliers to give advance notice of planned interruptions.

229 See Comment, *Blackout of Interconnected Electric Power Companies: Recovery and Prevention Measures*, 53 MINN. L. REV. 162, 171 (1968).

230 *Id.*

ucts to consumers, and might also create strict liability for injuries caused by defective utility equipment. In non-delivery cases brought under the Code, utility companies would bear the burden of proving the elements of excuse under section 2-615, including proving that its own fault did not contribute to the failure to deliver. Finally, Code concepts might bring about other changes in the law affecting utility suppliers and their consumers.<sup>231</sup>

Although all of these changes would increase the legal vulnerability of utility companies, each is justified by a strong social interest in making the supply of utility products safer and more dependable. Such changes would undoubtedly increase the cost of utility products, but the fact that products will become more expensive is no reason to forestall necessary legal developments. The spectre of higher costs has been raised to forestall such laudable developments as the decline of sovereign immunity and, indeed, the development of product liability doctrines.

In order to intelligently decide whether the benefits of applying the Code to utility supply contracts are worth the cost, courts must be provided more information regarding the extent of those costs. If careful economic study reveals that the cost outweighs the benefits, legislation exempting utility products from the Code's coverage might be in order.<sup>232</sup> Alternatively, the courts would be justified in applying the Code by analogy in limited types of cases.

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<sup>231</sup> Other potential changes are discussed at notes 14 (statute of limitations), 221 (application of concept of unconscionability to exculpatory clauses) and 228 (relationship of notice requirements of U.C.C. § 2-615 to obligation to give advance notice of deliberate temporary interruptions), *supra*.

<sup>232</sup> Utility products could be specifically exempted from the coverage of the Code and product liability doctrines as, for example, human blood and tissue products have been in most states. *See, e.g.*, IND. CODE ANN. § 16-8-7-2 (Burns 1973), which provides:

The procurement, processing, distribution or use of whole blood, plasma, blood products, blood derivatives, or other human tissue, such as corneas, bones or organs by a bank, storage facility or hospital and the injection, transfusion or transplantation of any of them into the human body by a hospital, physician or surgeon, whether or not any remuneration is paid is declared to be for all purposes the rendition of a service and not the sale of a product. No such services shall give rise to an implied warranty of merchantability or fitness for a particular purpose, nor give rise to strict liability in tort.

The constitutionality of such statutes has been unsuccessfully challenged on equal protection grounds. *See McDonald v. Sacramento Medical Foundation Blood Bank, Inc.*, 62 Cal. App. 3d 866, 133 Cal. Rptr. 444 (1976); *Bingham v. Lutheran General and Deaconess Hosps.*, 34 Ill. App. 3d 562, 340 N.E.2d 220 (1975). *See also* the cases at note 27 *supra*.